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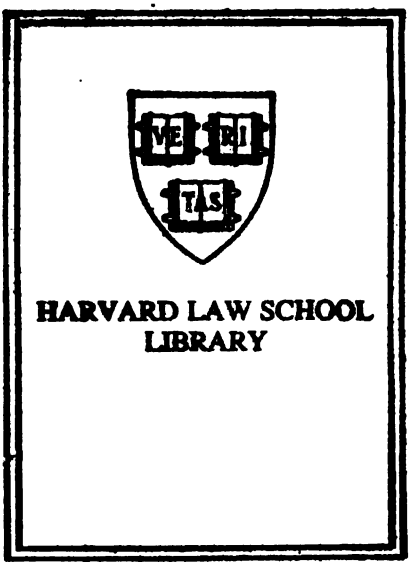

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July 15

91

REPORT OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI,

AT THE

MARCH TERM, 1903, AND OCTOBER TERM, 1903.

Vol. 82.

REPORTED BY

T. A. McWILLIE.

NASHVILLE, TENN.:
MARSHALL & BRUCE CO., LAW PUBLISHERS.
1904.

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OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. ALBERT H. WHITFIELD, *Chief Justice*,
HON. SAMUEL H. TERRAL,[1]
HON. SOLOMON S. CALHOON,
HON. JAMES H. PRICE,[2]
HON. JEFF TRULY,[3]
} JUDGES.

WILLIAM WILLIAMS,	*Attorney-General.*
JAMES N. FLOWERS,	*Assistant Attorney-General.*
THOMAS A. MCWILLIE,	*Reporter.*
EDWARD W. BROWN,[4]	*Clerk.*
GEORGE C. MYERS,	*Clerk.*

[1] JUDGE TERRAL died March 21, 1903, and HON. JAMES H. PRICE was appointed to fill the vacancy March 23, 1903.

[2] JUDGE PRICE resigned August, 1903, and HON. JEFF TRULY succeeded to the place.

[3] JUDGE TRULY was appointed August 15, 1903.

[4] EDWARD W. BROWN, Clerk, died September 19, 1903, and GEORGE C. MYERS was appointed to fill the vacancy September 22, 1903, and was elected to the office in November following.

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CIRCUIT JUDGES.

First District, . . .	HON. EUGENE O. SYKES.
Second District, . .	HON. WILLIAM T. McDONALD.
Third District, . . .	HON. PERRIN H. LOWREY.[1]
Fourth District, . .	HON. A. McC. KIMBROUGH.
Fifth District, . . .	HON. WILLIAM F. STEVENS.
Sixth District, . .	HON. MOYSE H. WILKERSON.
Seventh District, . .	HON. DAVID M. MILLER.
Eighth District, . .	HON. JOHN R. ENOCHS.
Ninth District, . . .	HON. GEORGE ANDERSON.
Tenth District, . .	HON. GUION Q. HALL.
Eleventh District, . .	HON. SAMUEL C. COOK.

[1] HON. PERRIN H. LOWREY resigned on the 7th day of October, 1903, and HON. J. B. BOOTHE was appointed to the place on the 8th day of October, 1903.

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CHANCELLORS.

First District, . . .	HON. HENRY L. MULDROW
Second District, . .	HON. STONE DEAVOURS.[1]
Third District, . . .	HON. JULIAN C. WILSON.
Fourth District, . .	HON. WM. P. S. VENTRESS.
Fifth District, . . .	HON. ROBERT B. MAYES.
Sixth District, . .	HON. JAMES F. MCCOOL.
Seventh District, . .	HON. CARY C. MOODY.
Eighth District, . .	HON. THADDEUS A. WOOD.

[1] CHANCELLOR DEAVOURS resigned May 30, 1904, and HON. JAMES L. MCCASKILL was appointed to the place June 17, 1904.

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DISTRICT ATTORNEYS.

First District,	J. W. Barron, Esq.
Second District,	J. R. Tally, Esq.
Third District,	William A. Roane, Esq.
Fourth District,	S. D. Neal, Esq.
Fifth District,	T. U. Sisson, Esq.
Sixth District,	J. B. Webb, Esq.
Seventh District,	J. B. Greaves, Esq.
Eighth District,	Robert Sylvester McLaurin, Esq.
Ninth District,	James DeLoach Thames, Esq.
Tenth District,	J. H. Currie, Esq.
Eleventh District,	Earl Brewer, Esq.

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TABLE OF CASES REPORTED.

Abbay, State *ex rel.*, Brewer, District Attorney, *v.* . 559
Adams, State Revenue Agent, Colonial & United States Mortgage Co. *v.* 263
Adams, State Revenue Agent, *v.* Dendy, ... 135
Adams, State Revenue Agent, Thurman *v.* 204
Ætna Insurance Co., Alabama & Vicksburg Railway Co. *v.* 770
Alabama & Vicksburg Railway Co. *v.* Ætna Insurance Co., ... 770
Alabama & Vicksburg Railway Co. *v.* Pounder, . . 568
Alabama & Vicksburg Railway Co. *v.* Schlenker, 770
American Express Co. *v.* Bradford, ... 130
Anderson *v.* McNeal, ... 542
Anderson *v.* State, ... 784
Archer *v.* Yazoo & Mississippi Valley Railroad Co., . 110
Armistead *v.* Barber, ... 788
Askew, Dickerson *v.* 436
Atkinson, Hammel *v.* 465

Baker *v.* State, ... 84
Ball *v.* Sledge (appeal dismissed), ... 747
Ball *v.* Sledge (merits), ... 749
Bank, First National of West Point, *v.* Bloch, . . 197
Bank of Forest *v.* Orgell, ... 81
Bank, Merchants & Farmers, *v.* Calmes, . . . 603
Barber, Armistead *v.* 788
Barrier *v.* Kelly, ... 233
Beall, Norfleet *v.* 538
Bennett *v.* Maxwell, ... 70
Bigner *v.* Hodges, ... 215
Blanks *v.* Southern Railway Co., ... 703
Blau *v.* State, ... 514

Digitized by Google

Bloch, First National Bank of West Point *v.* . . 197
Board of Levee Commissioners for Yazoo and Mississippi Delta *v.* Nelms, ... 416
Bounds, Collins *v.* 447
Bradford, American Express Co. *v.* 130
Brandon, Winner *v.* 767
Brewer, District Attorney, State *ex rel.*, *v.* Abbay, . 559
Brown, Hardison, Kenoye, Guardian of *v.* . . 607
Brown, Kenoye *v.* 607
Building & Loan Association, Georgia, *v.* Grant, . 424
Bullock, Holloman *v.* 405
Bussey, Gulf & Ship Island Railroad Co. *v.* . . 616
Butterfield Lumber Co. *v.* Hartman, ... 494
Butts *v.* Ricks, ... 533

Calmes, Merchants & Farmers Bank *v.* 603
Carver, City of Jackson *v.* 583
Casey, Morrison *v.* 522
Cheaves *v.* Southern Railway Co., ... 48
City of Jackson *v.* Carver, ... 583
City of Vicksburg, Trowbridge, Mayor, etc., *v.* Schmidt, ... 475
City of Yazoo City *v.* Lightcap, ... 148
Clark *v.* Pierce, ... 462
Collins *v.* Bounds, ... 447
Colonial & United States Mortgage Co., Adams, State Revenue Agent, *v.* 263
Cooper *v.* Yazoo & Mississippi Valley Railroad Co., . 634

Dabney *v.* State, ... 252
Dendy, Adams, State Revenue Agent, *v.* . . . 135
Denham, Illinois Central Railroad Co. *v.* . . . 77
Dickerson *v.* Askew, ... 436
Dickerson, Weiner *v.* 63
Diggs *v.* Ingersoll, ... 493
District Attorney, Brewer, State *ex rel.*, *v.* Abbay, . 559

Digitized by Google

District Attorney, Greaves, Ellis *v.* 36
Durfrey, Ohlson *v.* 213

Elkin *v.* Rives, ... 744
Ellis *v.* Greaves, District Attorney, ... 36
Express Co., American, *v.* Bradford, . . . 130

Filmer, McDugle *v.* 200
Fire Insurance Co., Pennsylvania, Ward *v.* . . 124
First National Bank of West Point *v.* Bloch, . . 197
Fooshee *v.* State, ... 609
Forrest, Bank of, *v.* Orgill, ... 81
Fugate *v.* State, ... 189
Fulcher *v.* State, ... 630

Gamblin *v.* State, ... 73
George, New Orleans & North Eastern Railroad Co. *v.* 710
Georgia Building & Loan Association *v.* Grant, . . 424
Grant, Georgia Building & Loan Association *v.* . . 424
Greaves, District Attorney, Ellis *v.* 36
Greenville Wharf & Storage Co., Leavenworth *v.* . 578
Gulf & Chicago Railroad Co., Johnson *v.* . . . 452
Gulf & Ship Island Railroad Co. *v.* Bussey, . . 616
Gulf & Ship Island Railroad Co. *v.* Nelson, . . 653
Gulf of Mexico Land & Improvement Co., Louisville & Nashville Railroad Co. *v.* 180

Hammel *v.* Atkinson, ... 465
Hannah, Mortimer *v.* 645
Hardison, Kenoye, Guardian of, *v.* Brown, . . 607
Harkins, Keenan *v.* 709
Hartman, Butterfield Lumber Co. *v.* 494
Hawkins, Kansas City, Memphis & Birmingham Railroad Co. *v.* 209
Heggie, Stone *v.* 410
Hodges, Bigner *v.* 215
Holloman *v.* Bullock, ... 405

Digitized by Google

Illinois Central Railroad Co. *v.* Denham, . . . 77
Ingersoll, Diggs *v.* 493
Insurance Co., Ætna, Alabama & Vicksburg Railway Co., *v.* 770
Insurance Co., Mississippi Home, Rosenstock *v.* . . 674
Insurance Co., Pennsylvania Fire, Ward *v.* . . 124

Jackson, City of, *v.* Carver, ... 583
Jenkins *v.* State, ... 500
Johnson *v.* Gulf & Chicago Railroad Co., . . . 452
Johnson *v.* Jones, ... 483
Jones, Johnson *v.* 483

Kansas City, Memphis & Birmingham Railroad Co. *v.* Hawkins, ... 209
Kansas City, Memphis & Birmingham Railroad Co. *v.* Wiygul, ... 223
Kearney, Sheehan *v.* 688
Keenan *v.* Harkins, ... 709
Kelly, Barrier *v.* 233
Kelly, Ray *v.* 597
Kenoye *v.* Brown, ... 607
King *v.* Rowan, ... 1

Land & Improvement Co., Gulf of Mexico, Louisville & Nashville Railroad Co. *v.* 180
Land & Improvement Co., Meridian, *v.* Ormand, . 758
Lane *v.* State, ... 555
Larson *v.* Larson, ... 116
Larson, Larson *v.* 116
Leatherberry, White *v.* 103
Leavenworth *v.* Greenville Wharf & Storage Co. . 578
Leland *v.* State, ... 132
Levee Commissioners, Board of, for Yazoo and Mississippi Delta *v.* Nelms, ... 416
Levy *v.* Rossell (merits) 527
Levy *v.* Rossell (motion) 68

Digitized by Google

Lightcap, Yazoo City *v.* 148
Lott *v.* Payne, ... 218
Louisville & Nashville Railroad Co. *v.* Gulf of Mexico Land & Improvement Co., ... 180
Lumber Co., Butterfield, *v.* Hartman, ... 494

Mackmasters *v.* State, ... 459
Maxwell, Bennett *v.* 70
Mayor Trowbridge of Vicksburg *v.* Schmidt, . . 475
McDonald, Slaydon *v.* 504
McDugle *v.* Filmer, ... 200
McNeal, Anderson *v.* 542
Merchant & Farmers Bank *v.* Calmes, . . . 603
Meridian Land & Improvement Co. *v.* Ormond, . . 758
Mississippi Home Insurance Co., Rosenstock *v.* . . 674
Morrison *v.* Casey, ... 522
Mortgage Co., Colonial & United States, Adams, State Revenue Agent, *v.* 263
Mortimer *v.* Hannah, ... 645
Mortimer, State *v.* 443
Murdin *v.* State, ... 507

Nelms, Board of Levee Commissioners for Yazoo and Mississippi Delta *v.* 416
Nelson, Gulf & Ship Island Railroad Co. *v.* . . 653
New Orleans & North Eastern Railroad Co. *v.* George, 710
Norfleet *v.* Beall, ... 538

O'Brien *v.* Wilson, ... 93
Ohlson *v.* Durfrey, ... 213
Orgill, Bank of Forrest *v.* 81
Ormond, Meridian Land & Improvement Co. *v.* . . 758
Owens *v.* State (first case), ... 18
Owens *v.* State (second case), ... 31

Payne, Lott *v.* 218
Pearce, Clark *v.* 462

Digitized by Google

Pearce, Western Union Telegraph Co. *v.* . . . 487
Pennsylvania Fire Insurance Co., Ward *v.* . . . 124
Postal Telegraph Co. *v.* Wells, ... 733
Pounder, Alabama & Vicksburg Railway Co. *v.* . . 568
Pulpus *v.* State, ... 548

Quin *v.* State, ... 75

Railroad Co., Gulf & Chicago, Johnson *v.* . . . 452
Railroad Co., Gulf & Ship Island, *v.* Bussey, . . 616
Railroad Co., Gulf & Ship Island. *v.* Nelson, . . 653
Railroad Co., Illinois Central, *v.* Denham, . . . 77
Railroad Co., Kansas City, Memphis & Birmingham, *v.* Hawkins, ... 209
Railroad Co., Kansas City, Memphis & Birmingham, *v.* Wiygul, ... 223
Railroad Co., Louisville & Nashville, *v.* Gulf of Mexico Land & Improvement Co., ... 180
Railroad Co., New Orleans & North Eastern *v.* George, 710
Railroad Co., Vicksburg Power & Manufacturing Co., *v.* White, ... 468
Railroad Co., Yazoo & Mississippi Valley, Archer *v.* . 110
Railroad Co., Yazoo & Mississippi Valley, Cooper *v.* . 634
Railroad Co., Yazoo & Mississippi Valley, *v.* Smith, . 656
Railroad Co., Yazoo & Mississippi Valley, *v.* Watson, 89
Railroad Co., Yazoo & Mississippi Valley, *v.* White, . 120
Railroad Co., Yazoo & Mississippi Valley, Williams *v.* 659
Railway Co., Alabama & Vicksburg, *v.* Ætna Insurance Co., ... 770
Railway Co., Alabama & Vicksburg *v.* Pounder, . 568
Railway Co., Alabama & Vicksburg *v.* Schlenker, . 770
Railway Co., Southern, Blanks *v.* 703
Railway Co., Southern, Cheaves *v.* 48
Ray *v.* Kelly, ... 597
Revenue Agent, Adams, State *v.* Colonial & United States Mortgage Co., ... 263

Digitized by Google

Revenue Agent, Adams, State *v.* Dendy, . . . 135
Revenue Agent, Adams, State, Thurman *v.* . . . 204
Ricks, Butts *v.* 533
Rives, Elkins *v.* 744
Rogers *v.* State, ... 479
Romano, Thomas *v.* 256
Rosenbaum *v.* Rosenbaum, ... 454
Rosenbaum, Rosenbaum *v.* 454
Rosenstock *v.* Mississippi Home Insurance Co., . . 674
Rossell, Levy *v.* (merits) 527
Rossell, Levy *v.* (motion) 68
Rowan, King *v.* 1

Schlenker, Alabama & Vicksburg Railway Co. *v.* . 770
Schmidt, Trowbridge, Mayor of Vicksburg, *v.* . . 475
Shaw *v.* Woffard, ... 143
Sheehan *v.* Kearney, ... 688
Short *v.* State, ... 473
Slaydon *v.* McDonald, ... 504
Sledge, Ball *v.* (appeal dismissed) 747
Sledge, Ball *v.* (merits) 749
Smith *v.* State, ... 793
Smith, Yazoo & Mississippi Valley Railroad Co. *v.* . 656
Southern Railway Co., Blanks *v.* 703
Southern Railway Co., Cheaves *v.* 48
Stanley *v.* State, ... 498
State, Anderson *v.* 784
State, Baker *v.* 84
State, Blaw *v.* 514
State, Dabney *v.* 252
State, Foochee *v.* 509
State, Fugate *v.* 189
State, Fulcher *v.* 630
State, Gamblin *v.* 73
State, Jenkins *v.* 500
State, Lane *v.* 555

Digitized by Google

State, Leland *v.* 132
State, Mackmasters *v.* 459
State *v.* Mortimer. 443
State, Murdin *v.* 507
State, Owens *v.* (first case) 18
State, Owens *v.* (second case) 31
State, Pulpus *v.* 548
State, Quin, *v.* 75
State, Rodgers *v.* 479
State, Short *v.* 473
State, Smith *v.* 793
State, Stanley *v.* 498
State, Sykes *v.* 555
State, Thomas *v.* 667
State, Wright *v.* 421
State, *Ex rel.* Brewer, District Attorney, *v.* Abbay, . 559
State Revenue Agent, Adams, *v.* Colonial & United States Mortgage Co., ... 263
State, Revenue Agent, Adams, *v.* Dendy, . . . 135
State Revenue Agent, Adams, Thurman *v.* . . . 204
Stone *v.* Heggie, ... 410
Sykes *v.* State, ... 555

Telegraph Co., Postal, *v.* Wells, ... 733
Telegraph Co., Western Union, *v.* Pearce, . . . 487
Telegraph Co., Western Union, *v.* Watson, . . 101
Thames *v.* State, ... 667
Thomas *v.* Romano, ... 256
Thurman *v.* Adams, State Revenue Agent, . . . 204
Trowbridge, Mayor of Vicksburg, *v.* Schmidt, . . 475

Vicksburg Railroad Co., Power & Manufacturing Co., *v.* White, ... 468
Vicksburg, Trowbridge, Mayor, *v.* Schmidt, . . 475

Waggoner, Work *v.* 591
Ward *v.* Pennsylvania Fire Insurance Co., . . . 124

Digitized by Google

Watson, Western Union Telegraph Co. *v.* . . . 101
Watson, Yazoo & Mississippi Valley Railroad Co. *v.* . 89
Weiner *v.* Dickerson, ... 63
Wells, Postal Telegraph Co. *v.* 733
Western Union Telegraph Co. *v.* Pearce, . . . 487
Western Union Telegraph Co. *v.* Watson, . . . 101
Wharf & Storage Co., Greenville, Leavenworth *v.* . 578
White *v.* Leatherberry, ... 103
White, Yazoo & Mississippi Valley Railroad Co. *v.* . 120
Williams, Winner *v.* 669
Williams *v.* Yazoo & Mississippi Valley Railroad Co. . 659
Wilson, O'Brien *v.* 93
Winner *v.* Brandon, ... 767
Winner *v.* Williams, ... 669
Wiygul, Kansas City, Memphis & Birmingham Railroad Co. *v.* 223
Woffard, Shaw *v.* 143
Work *v.* Waggoner, ... 591
Wright *v.* State, ... 421

Yazoo City *v.* Lightcap, ... 148
Yazoo & Mississippi Delta, Board of Levee Commissmissioners for, *v.* Nelms, ... 416
Yazoo & Mississippi Valley Railroad Co., Archer *v.* . 110
Yazoo & Mississippi Valley Railroad Co., Cooper *v.* . 634
Yazoo & Mississippi Valley Railroad Co. *v.* Smith, . 656
Yazoo & Mississippi Valley Railroad Co. *v.* Watson, . 89
Yazoo & Mississippi Valley Railroad Co. *v.* White, . 120
Yazoo & Mississippi Valley Railroad Co., Williams *v.* . 659

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

MARCH TERM, 1903.

BENJAMIN KING ET AL. *v.* WALTER H. ROWAN ET AL.

1. WILLS. *Attesting witnesses. Weight of evidence.*

Whether attesting witnesses have opportunities which are superior to those of other witnesses, to judge of and know the testator's mental capacity, at the time of the execution of his will, is a question of fact for the jury and not of law for the court.

2. SAME. *Devisavit vel non. Insanity. Burden of proof.*

Where on an issue *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *Mullins* v. *Cottrell*, 41 Miss., 291, disapproved.

3. SAME. *Instruction. Reasonableness or unreasonableness of will.*

Upon an issue *devisavit vel non* an instruction for contestants is erroneous if it authorize the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will.

FROM the chancery court of Copiah county.

HON. HENRY C. CONN, Chancellor.

The suit was a contest of the will of Mrs. Evaline King, deceased widow of the late Col. Benjamin King, of Copiah

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Brief for appellants.

county. Rowan and others, appellees, grandchildren of the testator, were the contestants, and Benjamin King and Mrs. Eva King Bloom, appellants, a son and a daughter, respectively, of the testatrix, were the proponents of the will. By the terms of the will one-third, approximately, of the testatrix's estate was devised and bequeathed to her son, Benjamin, and two-thirds, approximately, thereof to her daughter, Mrs. Bloom; nothing whatever was given to the grandchildren, the children of deceased daughters of testatrix.

The contestants claimed, first, that Mrs. King was mentally incapacitated at the time she executed the will, and, second, that its execution was procured by undue influence exercised by Benjamin King and Mrs. Bloom, the devisees and legatees under and the proponents of the will.

The issues thus presented, with a large number of instructions, were submitted to a jury, which found for contestants. The court below overruled appellants' motion for a new trial, and adjudged the will void, whereupon appellants, proponents, appealed to the supreme court.

The instructions given and refused by the court below are sufficiently stated in the opinion of the court.

A statement of the evidence is unnecessary to an understanding of the legal questions decided by the court.

McWillie & Thompson, for appellant Mrs. Bloom; *Mayes & Harris,* for appellant Benjamin King; *Benjamin King pro se,* and *R. N. Miller,* for both appellants.

The state of Mrs. King's feelings towards the contestants, for which the proponents are in no way responsible, fully accounts for their not being made the objects of her bounty and is entirely consistent with the most perfectly sound mind. There is no evidence in the record which can justly be said to indicate undue influence. The partiality which makes a testator discriminate between relatives in equal degree and which may be the result of affection or gratitude affords no foundation for

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the charge of undue influence. In this case we find the persons favored were in closer relationship; that one of them, her son, had been all the time in immediate association with his mother, living upon an adjoining lot, often providing her with delicacies for her table and assisting her in the management of her business, and that the daughter, who lived some thirty or forty miles distant, corresponded with her mother, exchanging gifts and visits with her, and in the great trial of her last illness was her stay and comfort; and yet between this son and daughter the testatrix discriminated, giving the daughter, who was closer to her heart, more than she did the son. In the absence of all evidence of force, fear, threats and coercion, whereby the will of another is made to take the place of that of the testator, the contestants have been forced to rely upon such trivial circumstances as that the son, Benjamin King, was the draughtsman of the will, and that he went after the subscribing witnesses. As the old lady was entitled to make a will, and had to leave the drawing of it to another, and by reason of her illness was unable to go after the witnesses herself, the import of these facts is not discernible. That Mrs. King did not intend in any case to give her property, or any part of it, to her grandchildren, is shown by Dr. Rowan's testimony that she stated that if Mrs. Bloom did not stop worrying her about it she would give it to a charitable institution. In no event were the grandchildren to get it.

The claim of undue influence being wholly unsupported, the contestants in their declaration endeavored to show by equally flimsy evidence that Mrs. King was mentally incapable of making a will at the date of the one in question.

The only witness relied on to show mental incapacity was Dr. J. A. Rowan, the father of several of the contestants, who was also the attending physician of Mrs. King in her last illness. This gentleman's idea of the state of Mrs. King's mind was quite different from that of everyone else who saw her, and there are some features of his testimony which it may be profit-

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Brief for appellants.

able to note. His classification of her mental disturbance was "moral civil insanity," something new in medical jurisprudence. Moral insanity may be a question with reference to acts of the subject whether civil or criminal, but "moral civil insanity" as a technical term is not found in any authority within our reading. The reasons he gives for her moral insanity, that morbid state indicating a perversion of the moral feelings, have no relation whatever to morals, but merely to intellectual capacity. There was absolutely nothing in the case upon which the charge of moral insanity could be founded. Even the resentment at the coldness and indifference of her grandchildren which Mrs. King evidently entertained could not be exaggerated into the vindictive and causeless hatred which sometimes indicates moral insanity. Moreover, it was not a part of the campaign to put forward her feeling toward her grandchildren as the indication of her insanity, for that did not consist with the idea that the testatrix had no such feeling and would have provided for them in her will but for undue influence. The indications of "moral civil insanity" mentioned by Dr. Rowan as characterizing the case, were jumping from one subject to another, irrational sayings, and loss of memory, but as the Doctor could not recall an instance of her jumping from one subject to another, nor a single irrational speech, his memory would seem to have been the worse of the two. He could refer to but one circumstance to show her loss of memory, and we find that in the statement that on one occasion when she called for ice water she seemed to have forgotten that she had already had some not long before. The Doctor's estimate of Mrs. King's mental condition can best be judged from the fact that, although he says it kept getting worse and worse all the time, he thinks what she said some time after the date of the will worthy of being embodied in his testimony as the language of a person of sound mind. She was sufficiently sane to be quoted when her language might be prejudicial to the proponents, but not at other times. He says that after the

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Brief for appellants.

date of the will, she told him she had been tricked and wanted to get well in order to right a wrong. Conceding that this conversation took place as stated, it does not necessarily relate to the will, which she could easily alter without getting well, but it does show that Dr. Rowan regarded her as then capable of judging of the nature and quality of her own acts, and as well the conduct of others. If she could detect a trick, she was not an imbecile; and if she wished to correct a wrong, she was not a moral pervert. The proponents moved to exclude this statement of the witness, because it referred to a conversation after the execution of the will, and the action of the lower court in admitting it is assigned for error; but it strikes us that the case of the contestants is rather hurt than helped by it, for it shows that even the Doctor credited Mrs. King with lucid intervals after the date of the will.

The court will observe that Dr. Rowan did not pretend to know the state of Mrs. King's mind at the time she made the will, and the subscribing witnesses, old acquaintances, say her mind was as clear as it had ever been in her life. Leaving out the testimony of Ben King and Mrs. Bloom, when we consider the weight given to the testimony of subscribing witnesses in *Brock* v. *Luckett's Exrs.*, 4 How. (Miss.), 459, and the degree of proof required to show mental incapacity as decided in *Mullins* v. *Cottrell*, 41 Miss., 291, it cannot be doubted that in this case the appellees were entitled to have the jury directed to return a verdict in their favor.

What is undue influence? Every case of influence exerted is not "undue influence." "Undue influence" must be influence obtained by fraud or fear, and must be of that degree which amounts to force or fraud, which destroys the free agency of the testator and compels him to do what is against his will, and which he is absolutely unable to refuse and too weak to resist.

"If the testator is too weak to exercise his will, and his judgment has been overcome by force or fear or importunities carried to that degree which amounts to the overthrow of his free

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agency, then such influence is undue." *Knox* v. *Knox,* 36 Am. St. Rep., 235; *Waddington* v. *Busby,* 14 Am. St. Rep., 706; *In re Hess Will,* 31 Am. St. Rep., 206.

In other words, any influence which is so great and unfair as to substitute the will of another for that of the testatrix is "undue." But it has never been held that the influence which grows out of affection and kindly services of children, husband, wife, parents, or kindred was "undue."

The influence of Benjamin King, with his mother, or any son with a mother, has never been denounced as "undue" by any court in the world, and on the contrary, it is universally held not to be "undue influence." *Thompson* v. *Ish,* 17 Am. St. Rep., 552; *Goodbar* v. *Lidikey,* 43 Am. St. Rep., 296; *In re Hess Will,* 31 Am. St. Rep., 665; *Burney* v. *Torrey,* 46 Am. St. Rep., 33; *Henry* v. *Hall,* 54 Am. St. Rep., 22.

"The presumption in favor of the validity of a will is not overcome by the fact of unjust discrimination in favor of a son, who is both a devisee and executor under the will and is shown to have had a great influence over the testator in her business affairs, nor do these facts cast the burden of proof upon him to establish the validity of the will." *Berberet* v. *Berberet,* 52 Am. St. Rep., 634; *Eastis* v. *Montgomery,* 36 Am. St. Rep., 227; *Knox* v. *Knox,* 36 Am. St. Rep., 235; *Richmond's Will,* 21 Am. St. Rep., 85; see *Schierbaum* v. *Schemme,* 80 Am. St. Rep., 618, and note.

The burden of proof to establish both "undue influence" and insanity is upon the contestants of this will. *Cash* v. *Dust,* 64 Am. St. Rep., 576.

The above authorities establish that the burden of proof of "undue influence" is upon the contestants in the case. And they must show also, that it operated on the mind of the testatrix at the time that the will was made. They must show that this "undue influence" was present and existing, and dictated the will the day it was made, to wit: July 1, 1901. *Knox* v. *Knox,* 95 Ala., 495; 36 Am. St. Rep., 235; *In re*

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Brief for appellants.

Kaufman, 59 Am. St. Rep., 179; *Englert* v. *Englert,* 82 Am. St. Rep., 808.

"No amount of persuasions or appeals to the affection of ties of kindred or sentiments of gratitude for past services or pity for future destitution and the like, constitute 'undue influence.'" *Gay* v. *Gillilin,* 1 Am. St. Rep., 712.

"To invalidate a will, on the ground of 'undue influence,' it must be proved that it was procured by force, threats or coercion, destroying free agency. The exercise of the influence springing from the family relations, or from the consideration of service, affection or gratitude is not 'undue,' even though it be pressed to the extent of unreasonable importunity." *Hazard* v. *Hazard,* 2 Hun., 446, S. C., and "it is a general rule that the provisions of a will of themselves are not evidence of 'undue influence' or of mental incapacity, whatever the terms may be." *Floyd* v. *Floyd,* 49 Am. Dec., 629, and note; *Dickie* v. *Carter,* 42 Ill., 388.

"'Undue influence' cannot be presumed or inferred from opportunity or interest, but it must be proved to have been exercised, and exercised in relation to the will itself, and not merely to the other transactions." *Tyler* v. *Gardner,* 35 N. Y., 613; *Dees* v. *Wandle,* 3 Thomp. & C., 129; *Rutherford* v. *Morris,* 77 Ill., 414; *Bicknell* v. *Bicknell,* 2 Thomp. & C., 103; *Seguine* v. *Seguine,* 4 Abb. App., 198; 35 How. Pr., 343.

Extreme old age, sickness, pain or suffering are not of themselves sufficient to invalidate a will. *Stevens* v. *Leonard* 77 Am. St. Rep., 446; *Taylor* v. *Kelly,* 68 Am. Dec., 159. Nor mere eccentricity, however great. *Addington* v. *Wilson,* 60-61 Am. Dec., 84, and note; *Dran* v. *Nagley,* 80 Am. Dec., 620.

The above array of authority, carefully read, demonstrates that no sort of suspicion of "undue influence," growing out of the most sacred relation of life, can be presumed, but on the contrary, the policy of the law is to encourage and give full play to those tender influences growing out of sacred family

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relations. And that because Benjamin King was the son of his mother, and served her in her business affairs and wrote her will, and because Mrs. Bloom was her daughter, and nursed her in her last sickness and protected her sick bed from interruptions by visits, of even her grandchildren, and because the fact that both Mrs. Bloom and Benjamin King argued and advised with her and tried to induce her to make her will in conformity with their wishes, that none of these things were unlawful or "undue."

There is no dispute that if "undue influence"' existed, it must, in order to overthrow the will, influence, direct and control the free agency of the testatrix in and about the execution of the will itself at the very time it was made. The testimony of Mrs. Bloom, and of King, supported by that of the two attesting witnesses, Bridewell and Moody, stands absolutely undisputed or uncontradicted, and shows conclusively that on the 1st day of July, 1901, when Mrs. King made this will, it was read over word by word to her, and she declared it the expression of her free will, and that there was no sort of "undue influence" there present of any kind, and the court should then and there have withdrawn that issue from the jury. *In re Kaufman,* 59 Am. St. Rep., 179.

"If a will is shown to have been executed according to law by a person of sound mind, the burden of proving that it is the result of fraud and 'undue influence' is upon the contestants who make the charge, and the mere fact that it apparently unjustly discriminates against one of the testator's children in favor of another, does not shift the burden of proof to that other to account therefor. A man has the right to will his property to whomsoever he chooses, and the beneficiary is not bound to account for his choice." *Schierbaum* v. *Schemme,* 80 Am. St. Rep., 604.

The testamentary capacity of the testatrix. What is the standard required by the law of capacity to make a will? We

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repeat that extreme old age and sickness, pain and suffering — none of these things nor all combined make testamentary incapacity. See cases *supra.*

"Capacity to make a will is, that at the time of its execution, he be possessed of sufficient intelligence and memory to fairly and rationally comprehend the effect of what he is doing, and the nature and condition of his property; to understand who are and who should be the natural objects of his bounty, and his relation to them, the manner in which he wishes to distribute it among, or withhold it from them, and the scope and bearings of the provisions of the will he is making.

"Mere physical weakness or disease, old age, eccentricities, blunted perception, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary incapacity." *Richmond's Appeal,* 21 Am. St. Rep., 85, and note.

"A man may have mental capacity to make a will and yet be incapable of making a contract or managing his estate." *Maddox* v. *Maddox,* 35 Am. St. Rep., 734.

"A sound and disposing mind in a testator does not imply that the powers of his mind may not have been weakened or impaired by old age or bodily disease. A testator may be incapacitated by age and failing memory from engaging in complex and intricate business, and yet be able to give simple directions for the disposition of his property by will." *Hall* v. *Perry,* 47 Am. St. Rep., 352. The testatrix in this last case was much older and much more infirm than Mrs. King.

The authorities which draw the proper distinction between an intellect enfeebled by disease and testamentary incapacity are confirmed by our own courts in *Brock* v. *Luckett,* 4 How. (Miss.), 482, when it quotes with approval the case of *Clark* v. *Cartright,* 1 Ecc. R., 47.

The record shows that Mrs. King was 74 years of age, but that the usual infirmities of age had not fallen upon her. But on the contrary, that she was a woman of unusual judgment and strong will up to the time of her death, with the exception

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of the accompaniments of weakness attendant upon her illness. Bridewell, an unusually intelligent witness, and one of the subscribing witness to the will, after hearing this testimony as to her mental capacity, says "that on the day and at the time she executed the will, he never saw her when her mind and judgment seemed to be clearer and more rational.

The contestants, with the burden of proof upon them, rely alone upon the testimony of J. A. Rowan, whose testimony shows that he is not an expert. *Kerr* v. *Lunsford*, 2 L. R. A., 668. A non-expert witness can never give his opinion without stating the facts on which they are founded. Gillett on Indirect and Collateral Evidence, sec. 214, and note 1. 1 Greenleaf on Evidence, 580, last edition; 1 Rice on Evidence, pp. 348, 250, 354, 355; 1 Wharton on Evidence, sec. 513; 10 Rose Notes, U. S., 841; 11 U. S., 620, 621; *Hopkins* v. *Wheeler*, 79 Am. St. Rep., 819; 22 Am. Rep., 441; 50 Am. Dec., 329; 133 N. Y., 544; *Englert* v. *Englert*, 82 Am. St. Rep., 808.

The court erred in refusing to give the second charge for the proponents, because it is in the very language of our court in *Brock* v. *Luckett*, 4 How. (Miss.), 482; and is not an invasion of the province of the jury; it is the law that subscribing witnesses are entitled to greater weight than others, and it ought to be given on the same principle that courts give caution in the application of circumstantial evidence.

The third instruction refused for proponents ought to have been given, because it is in the very language of our court in the case of *Mullins* v. *Cottrell*, 41 Miss., 292.

The twelfth instruction given for the contestants is exceedingly vicious and hurtful. It is liable to a double objection.

A specially objectionable feature of this instruction is the fact that it informs the jury that in considering the question as to whether there was any undue influence used, they are to take into consideration "the reasonableness or unreasonableness of the will."

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Brief for appellees.

It is impossible to deny that from this instruction the jury would understand that in passing on the question of undue influence they are authorized to take into consideration what the members of the jury might conceive to be an inequality and a possible injustice in the provisions of the will as between one set of children and another.

We submit that such is not the law. The question of undue influence cannot be brought to the test, on the trial of an issue. *devisavit vel non,* of the notions and ideas and sentiments of a jury about fairness and inequality as between various members of the testator's family. *Turnure* v. *Turnure,* 35 N. J. Eq., 437; *Kise* v. *Heath,* 33 N. J. Eq., 239; *Bundy* v. *McKnight,* 48 Ind., 503.

This court has itself, in the case of *Mullins* v. *Cottrell,* 41 Miss., 291, 324, expressly decided that a will may on its face be reasonable, even where the deceased disinherited his daughter and left his property to his neice, which was a further departure from the ordinary rule of inheritance than has occurred here.

R. P. Willing, Jr., H. J. Wilson, and *Robert B. Mayes,* for appellees.

The record shows abundantly that, at the time of Mrs. King's death, she was in a weak and enfeebled condition; an operation had been performed, and she had dwindled away from a weight of 150 pounds to only 75 pounds. The fact that she subsequently died shows that she was then on her death bed. She was attended by her daughter and son, the son being a lawyer. All the others of her relatives were excluded from her, and she died a very short time after the execution of the will. She then had fever, and was under the influence of narcotics, and it is stated as the opinion of Dr. Rowan, the attending physician, that she did not have sufficient mental capacity to make a will; but be this as it may, this case was tried before a jury, and from all the facts and circumstances, whether from mental incapacity

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or undue influence, it matters not, the jury, after considering all these things, brought in a verdict finding that the pretended will was not the last will and testament of Mrs. Evaline King.

In the case of *McAlexander* v. *Puryear,* 48 Miss., 420, the court said: "A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent errors may have produced it."

Again, in *Railroad Co.* v. *Cantrell,* 70 Miss., 329, and *Railroad Co.* v. *Williams,* 67 Miss., 18, the court said: "If a verdict is supported by evidence, and the court cannot see that the jury was unwarranted in reaching its conclusion, it will not be disturbed, although a finding for the opposite party would have been more satisfactory to the court."

Again, in *Harris* v. *Haliday,* 4 How. (Miss.), 338, the court has said that before a verdict will be disturbed, "the preponderance of evidence against the verdict must be very clear." And, again, in *Watson* v. *Dickens,* 12 Smed. & M., 608, the court said: "Where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the verdict will not be disturbed."

The instructions asked for by contestants, and granted by the court, are correct announcements of what the law is in reference to this class of cases, and there is no error in them. 25 Am. & Eng. Ency. Law (1st Ed.), 970; 27 Am. & Eng. Ency. Law (1st Ed.), 453, 454; *Ib.,* 501; 25 Am. & Eng. Ency. Law (1st Ed.), 992; 1 Greenleaf on Evidence, Sec. 13.

Argued orally by *R. N. Miller, T. A. McWillie,* and *Edward Mayes,* for appellants, and by *Robert B. Mayes,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The court below properly refused instruction No. 2, asked by the proponents. It is not the law that the testimony of subscribing witnesses is entitled to any greater weight than that of other witnesses with equal opportunities for observation. The

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charge proceeds upon the idea that the mere fact of being subscribing witnesses entitled their testimony to such greater weight. It does not proceed upon the theory that the value of the testimony of such witnesses is due to the fact simply that they do actually improve the opportunity given them for the more accurate and careful observation of the testator's capacity to make a will, and all the circumstances surrounding the execution of the will. The value of the testimony of any witness depends upon his opportunity for observing the fact or facts about which he testifies, and, since subscribing witnesses are called on to witness the execution of the will and all attendant circumstances illustrative of the capacity of the testator to make a will, and to observe whether or not, though capable, he has been unduly influenced, their testimony on these points, if they did fully improve the opportunity given them for observation, is, of course, more valuable than that of witnesses who did not enjoy like opportunity for observation. But this value is based upon the fact that the subscribing witnesses have both enjoyed and improved such opportunity for observation denied to other witnesses, and not upon the simple fact that they are subscribing witnesses. Subscribing witnesses, in the varying cases, may be persons of greatly differing intelligence, and of very vastly different capacity for observing, and making proper deductions from such obervation; and, besides, the opportunities which may be afforded at the time of execution of a will for such observation may differ very widely according to what may occur at the time. The chancellor, therefore, properly refused an instruction which declared the rule that the testimony of subscribing witnesses was to have greater weight than the testimony of other witnesses simply because the law required subscribing witnesses "to perform a certain duty." It is not a question of what the law required, but of whether the facts showed that the subscribing witness was afforded the opportunity of observation, and improved that opportunity. The best statement of the law on this subject that we have

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been able to find is contained in *Crandall's Appeal,* 63 Conn., at page 368; 28 Atl., 531; 38 Am. St. Rep., 375, where the court said: "The second request is: 'The jury should give special prominence to the testimony of the three attesting witnesses, both upon the question of capacity and of undue influence, because they were present at the time and place of the execution of the will, and had the means and the opportunity of judging of the testator's capacity, and are regarded in the law as placed around the testator in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity.' The effect of a compliance with this request would have been to place the attesting witnesses upon a higher plane, in the estimation of the jury, on the question of capacity and of undue influence, than other witnesses, although the latter may have had equal, or even superior, means of knowledge. That was, in effect, the claim of the appellees. And they now claim that the refusal of the court to comply with his request was an error, which entitled them to a new trial. We are aware of no principle of law or of any adjudged case which will justify this claim as broadly as it is here made. In the eye of the law, all witnesses of equal intelligence and with equal means of knowledge are equally credible. Had there been three other witnesses present, and their attention had been called to the condition of the testator precisely as was that of the attesting witnesses, we know not why their testimony would not have been entitled to the same consideration on the question of capacity and of undue influence. As the case stood, the attesting witnesses were present when the will was executed, and had an opportunity to observe the condition of the testator at the precise time. The other witnesses were not present, and had no such opportunity. So far as the matter was concerned, the appellees had the full benefit of it; for the jury were fully and clearly told that the question was as to the condition of the testator at that time, and that the nearer to that time the witnesses observed him the more important was their testimony.

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Opinion of the court.

We know of no other advantage that those witnesses had in respect to the questions in issue." In *Burney* v. *Torrey,* 100 Ala., at page 172; 14 South, 690; 46 Am. St. Rep., 33, the court says on this subject: "The testimony of a witness who attested the will should be weighed and considered as that of any other witness. The fact that he was an attesting witness of itself does not entitle his evidence upon a question of testamentary capacity to greater weight than he would otherwise be entitled to, except, perhaps, that by reason of his being an attesting witness the law authorizes him to give his opinion of the mental capacity of the testator." The same doctrine is laid down in Underhill on Law of Wills, vol. 1, sec. 102; Am. & Eng. Enc. of Law (1st ed.), vol. 25, p. 1016.

We note the fact that the instruction is taken almost literally from the opinion of the court in *Brock* v. *Luckett's Executors,* 4 How. (Miss.), 482. But it is not always safe to take the language of a court *arguendo,* and use it literally in an instruction. Instructions must be suited to the facts of the particular case.

The court also properly refused instruction No. 3, asked for proponents. It is not the law that insanity of a testator at the time of executing a will is to be proved, where the issue is a purely civil one, beyond all reasonable doubt. The rule to the contrary is too well settled to require citation of authorities, and we disapprove of the ill-advised statement to the contrary in *Mullins* v. *Cottrell,* 41 Miss., 291, cited from an old English case in 3 Haggard's Ecclesiastical Reports.

We think, however, that fatal error was committed by the court in the twelfth instruction for the contestants in telling the jury that they might, in determining whether undue influence had been used, consider "the reasonableness or the unreasonableness of the will," without qualification or limitation. Here was a will which gave two-thirds of the estate to the only living daughter, one-third to the only living son, and nothing to two sets of grandchildren by two deceased daughters. The jury may well have been misled by the unqualified manner in which

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Opinion of the court.

this clause in this instruction authorized them to consider the reasonableness or unreasonableness of the will as showing undue influence. The largely prevalent popular opinion that a will is unreasonable which discriminates as this will did may very likely have operated with this jury under this instruction. There doubtless are many cases in which the unnaturalness or unreasonableness of a will may, under proper qualifications, be accepted by the jury as one of the elements in determining the validity of the will as one having been obtained by undue influence, or as having been made without testamentary capacity. But courts should always, in giving this principle in charge to a jury, be careful to scrupulously guard the principle, so as to inform the jury that the issue which they are to try is whether the testator had testamentary capacity, or whether, though having it, he had been unduly influenced; and not whether, in the opinion of the jury, the will was an unnatural or an unreasonable one. It should be made clear to the jury that, however unreasonable and unnatural or unjust they may think the will is, they must uphold the will if, notwithstanding, they believe the testator had testamentary capacity, and was not unduly influenced. Underhill, in his work on Wills, vol. 1, sec. 105, thus expresses the rule: "It is, therefore, reversible error for the court to single out an unequal distribution from all facts in evidence, and to give a special instruction as to the effect that would have in determining that the testator was insane. The most that should be told the jury is that they may consider unnatural and unreasonable provisions, not alone, but in connection with all the evidence; and that, though they may believe the testator was not prompted by natural affection when he made the will, or although they may think its provisions are grossly unjust, still if, upon all the evidence, they believe the testator possessed capacity, his will must be sustained." The supreme court of California very accurately states our idea in *McDevitt's Case,* 95 Cal., 17, 30 Pac., 101, where the court said: "The right to dispose of one's property by

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will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners; and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what is just and proper." The instruction in this case is put far too broadly. It should have been carefully limited as stated. The jury may well have based their verdict on this instruction. And what makes it especially singular that this principle, thus unqualified, should have been stated in this charge, is that the court in the sixth charge for the proponents told the jury that the following was the law: "A will can never be held invalid because anybody, or even the jury, may think it unreasonable and unjust. That is the question that the law commits alone to the testator for his or her decision. Juries have no right, and courts have no right, to sit in judgment upon the justness and reasonableness of the provisions of a will." This sixth charge, itself too broad, is in direct and irreconcilable conflict with the clause quoted in the twelfth charge given to the contestants. And we are at a loss to understand how the very accomplished chancellor of the court below should have fallen into this error — a fatal one, upon the peculiar facts of this case — except it be for the reason that counsel on both sides had wearied him out with a wholly unnecessary number of requests for instructions. Counsel for proponents obtained twenty-six instructions and were refused five; thirty-one in all. Counsel for contestants obtained thirteen instructions, and were refused three; sixteen in all. In other words, the chancellor was actually inflicted with requests for forty-seven instructions in this case — a most unwise policy for counsel on both sides.

We have been very earnestly urged to hold that the court should have given a peremptory instruction for the proponents. The facts in this case are so voluminous, and the value of the

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Syllabus.

different facts testified to varies so greatly, that we prefer resting the reversal on the ground stated. Possibly no member of this court, if on the jury, would have found as the jury did; but that fact furnishes no true test for determining whether the verdict of the jury is manifestly wrong. *Railroad Co.* v. *Cantrell,* 70 Miss., 329; 12 South, 344. We are not authorized to exercise the delicate and difficult function of declaring the verdict of a jury manifestly wrong, except in those very rare cases where the evidence shows it to be so most convincingly and indubitably. As yet we feel better satisfied in remanding the case for a new trial. It may be that both sides may be able to introduce further testimony, which may make the matter more clear one way or the other.

Reversed and remanded.

WHITTINGTON OWENS *v.* STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Witness. Inducement to testify.*

Where a state's witness, who had been convicted of the crime, stated upon cross-examination on the trial of his co-defendant that no inducement had been offered him to testify as he had done, the state should not be permitted to prove the truth of the statement by the prosecuting attorney.

2. SAME. *Murder. Accessory before the fact. Code* 1892, § 950. *Sudden altercation. Instruction.*

Where the state proceeds in a murder case on the theory that the defendant was an accessory before the fact (under the statute, code of 1892, § 950, a principal) and had armed and instigated an hireling to aid two other persons in committing the murder, it was error to refuse defendant an instruction, there being testimony of which to predicate it, directing the jury to acquit, if they believed from the evidence that the hireling killed deceased, not in pursuance of defendant's instigation, but alone because of a sudden and unexpected altercation between deceased and one of the two persons mentioned.

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Statement of the case.

3. SAME. *Verdict. Ambiguity.*

Where the terms of a verdict are ambiguous the court is authorized and under a duty to have the jury make their meaning plain.

4. SAME.

In a murder case, the jury being authorized upon conviction to fix defendant's punishment at imprisonment for life in the penitentiary, a verdict in these words, "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court," is insufficient to support a judgment sentencing defendant to the penitentiary for life, each juror having stated upon the return of the verdict, in response to the court, that he did not mean that a death sentence should be imposed and most of them that the word "term" in the verdict meant less than life imprisonment.

FROM the circuit court of Marshall county.

HON. PERRIN H. LOWREY, Judge.

The appellant, Owens, was indicted by the grand jury of Lafayette county, for the murder of one John A. Montgomery, was tried and convicted and sentenced to death. He appealed therefrom to the supreme court and the conviction was reversed. See *Owens* v. *State,* 80 Miss., 499. The former report of the case gives a statement of the facts. The reader, however, is referred as well to the case of *Matthis* v. *State,* 80 Miss., 491, and to the footnote on page 493 of said volume. After the remand of the case, a change of venue was granted Owens on his application, to Marshall county, where he was again tried and convicted, from which, his motion for a new trial having been overruled, the present appeal was prosecuted by him to the supreme court.

Owens, appellant, was also indicted by the same grand jury for the murder of Hugh Montgomery, a brother of decedent in this case, and he was also indicted for the murder of one Williams, and was tried and convicted of this last crime and appealed to the supreme court. See *Owens* v. *State, post,* 31.

Matthis, who had been convicted of the crime (and since hanged), testified in the present case for the state. On his

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Statement of the case.

cross-examination, he stated that no inducement had been offered him to testify as he had done. The state, over the objection of defendant, was permitted to prove the truth of the statement.

In the course of his examination, Matthis further testified, on cross-examination, that "I went into the room with the two Montgomerys for them to go to bed, and Hugh Montgomery had taken a pistol away from me in August, and put me in jail, and gave the pistol to the jailer; John Montgomery got to bed first, and I held the light for them to get to bed, and sat down on the footboard, and Hugh sat down and talked, and finally pulled off his coat, and pulled off a scabbard and laid it under his pillow, and then pulled off his pants, and I asked Hugh to 'let me see that pistol you pulled off the scabbard,' and he says, 'I will show it to you some other time,' and I said, 'Let's see it now.' I had seen the handle, and knew it was mine. I says, 'You told me a damned lie about that pistol; you have got it, and I want it;' and he grabbed around for his pistol, and says, 'God damn you, I will take you to town to-night,' and as he done that the negro (Orlandus Lester) jumped in the door and shot Hugh on the side of the head, and John was reaching around for his pistol, and he shot John."

The fifteenth instruction asked for defendant and refused was as follows: "The court further instructs the jury that, although they may believe from the evidence that the witness Lester went to the house of defendant of his own accord, or was sent there by Matthis on the night of the killing of said officers, and that he (Lester) told defendant that the officers were at Matthis' house, and that he, or he and Matthis, wanted to kill said officers, and that the defendant gave Lester some buckshot shells and told him to go back to Matthis' house and kill said officers, and that the negro (Lester) did go back to the house of Matthis, where the officers were, and attempted to kill said officers, but was prevented by said Matthis from doing so, and that afterwards, and on the same night, Matthis and Hugh

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Brief for appellant.

Montgomery engaged in a quarrel about a pistol, and that while they were so engaged the negro (Lester) shot and killed said officers, not because Owens had told him to do so, or had in some way influenced him, but alone, because of the trouble between Matthis and Hugh Montgomery, then the jury should find the defendant not guilty."

The opinion of the court contains a further statement of the facts.

Stephens & Stephens, for appellant.

It was error to permit the district attorney to go upon the witness stand in order to bolster up his own witness.

There had been no charge that anyone, much less the state's attorney, had bribed or persuaded Matthis to testify. 1 Greenleaf, 469; *Madden* v. *State,* 65 Miss., 176; *Head* v. *State,* 44 Miss., 751, and *Williams* v. *State,* 79 Miss., 555.

The fifteenth instruction asked by defendant, and which was refused by the court, should have been given.

Owen is not to be held responsible for what was done in a difficulty that was wholly disconnected with the plot and plan made by him and the negro. Although he may have planned and arranged with Lester to kill the Montgomerys, and Lester left him fully intending to do so, yet if Lester decided not to kill the men, but afterwards did kill them, not because of anything Owen had said or done in the matter, but for another reason, then Owen was not a party to the affair.

The instruction simply carries the idea that if the negro abandoned, from any cause, the design to kill these men according to Owen's instructions or advice, but afterwards killed the men because of some other reason or influence, then the jury must find the defendant not guilty. The testimony of Matthis warrants the theory that Lester shot the officers because he, Matthis, was engaged in a difficulty with them.

It is the right of a defendant to have the jury instructed upon any theory that may be reasonably deduced from the evidence, and the refusal of this instruction was reversible error.

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Brief for appellee.

The verdict of the jury in this case is an absolute nullity; it is not such a verdict as the law warrants or recognizes in cases of this kind; no legal judgment could rightfully be pronounced upon it.

The court ought, either to have required the jury to put their verdict in legal form, or have declared a mistrial. At best it simply amounted to a mistrial, for there was no unanimity of consent among the jurors; and therefore no absolute and complete finding, for unanimity of consent is declared to be indispensable to the sufficiency of a verdict.

The written verdict was cloudy and ambiguous, and in attempting to clear it up and rid it of its ambiguity, as it was the duty of the court to do, it was unmistakably shown that the jury had not really agreed upon any verdict at all.

This court has held that the thing to be ascertained is the will and intention of the jury. The words employed in a verdict are the mere vehicles for conveying the jury's will; and where there are words in the verdict raising an apparent cloud as to what the actual intent and finding of the jury is, the court should dispel that cloud and have the jury make plain their meaning.

The oral statements of the jurors show beyond peradventure that they would never have returned a verdict under which they knew Owen would have either to hang or be imprisoned for life. *Smith* v. *State,* 75 Miss., 542, and authorities therein cited; Chamberlain's Best on Evidence, sec. 591; Clark's Criminal Procedure, 483, and cases cited; 43 Ala., 320; *Davis* v. *Searcy,* 79 Miss., 292.

Monroe McClurg, attorney general, for appellee.

The district attorney testified in response to the questions put to Matthis that he had been promised clemency if he should testify in the case against Owens. It was not only proper for the district attorney, who prosecuted for the state, to relieve the minds of the jury as to any supposed misconduct on his part, but it was competent rebuttal testimony tending to show the

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Brief for appellee.

falsity of that proposed by the defendant appellant. There is no reversible error found in this proposition. At most, it went to the credibility of the witness Matthis, and was, in fact, worth nothing more either for or against the accused Owen, who was not on the stand, or otherwise making a confession. It was irrelevant matter. *Madden's Case,* 65 Miss., 176. That case was not reversed because of the admission of such irrelevant testimony, and doubtless would not have been reversed at all but for the testimony admitted as to public sentiment. There is nothing in *Williams' Case,* 79 Miss., 555, touching this point.

"What do you mean by your verdict?" This question was addressed to the proposition as to whether the jury meant to say "guilty" or "not guilty." It cannot be lawfully otherwise propounded. Not a single juror of the twelve put upon a public gibbet in the presence of the defendant, counsel, interested friends, and a curious public, stated that he opposed a verdict of guilty — all were agreed on that — but each stated what he thought the law ought to be in such case. The trial judge let his foot slip in going into this unauthorized procedure, nevertheless found the correct meaning of the verdict twice rendered; namely, that the jury was unanimous in believing the defendant guilty as charged, but that none of them desired that he should be hung. He merely announced the law in such case by pronouncing the life imprisonment sentence. The purpose and intent of the law was certainly reached. Guilty of murder, but not to be hung. The law fixed the life sentence in such case, and the court so correctly ruled in his judgment. The legal effect of the verdict was unquestionably announced by the court. This case will not be reversed because the members of the jury had divergent notions as to what the penalty should be. The jury was unanimous in a verdict of guilty as charged, and that the accused should not be hung. All else were surplusage — almost judicial folly. The verdict was responsive to the issue. *Smith's Case,* 75 Miss., 551; *Penn's*

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Opinion of the court.

Case, 62 Miss., 450; *Traube's Case,* 56 Miss., 153; *Timmon's Case,* 56 Miss., 786; *Bedell's Case,* 50 Miss., 492; *James' Case,* 55 Miss., 57; *John's Case,* 78 Miss., 665; *McGuire's Case,* 76 Miss., 504.

On the single refused instruction there can be no possible substantial complaint. The other instruction granted at the request of the accused, especially the fourteenth, covered the whole case, and presented the full defense, even the theory contained in the refused instructions.

Argued orally by *H. D. Stephens* and *W. V. Sullivan,* for appellant, and by *William Williams,* attorney general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

It was error to permit the district attorney to testify that no inducement had been offered Matthis to testify against Owens. Matthis had expressly stated, himself, when asked, that no inducement had been held out. The only possible effect of this testimony was to permit the state to bolster the testimony of its witness, Matthis, in this unwarranted way. This has been expressly condemned twice by this court. *Madden* v. *State,* 65 Miss., 176; 3 South., 328, where the court said: "On the trial, one Morris, indicted for the same offense, was introduced by the state as a witness. He distinctly and fully testified to the guilt of the appellant on direct examination. On cross-examination he stated that some days after the burglary, and while he was confined in jail, he sent for the attorneys who had been engaged to prosecute the parties charged with the crime, and, being informed by them that any one of the number who would divulge all the facts would not be prosecuted, he determined, as he says, 'to make a clean breast and come clear.' To break the force of this statement, the state was permitted, over the objection of appellant, to prove by the counsel referred to by the witness, that no such promises were made. This should

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Opinion of the court.

never have been permitted. Whether the statement made by the witness on cross-examination was true or untrue was not relevant to the guilt or innocence of the defendant. The single purpose of the state in contradicting that statement was to break its force and effect as going to show that the inculpating testimony delivered on direct examination had been induced by promises of immunity from punishment. It was an effort to support the evidence given on direct examination, and to discredit that drawn out on cross-examination, and it was not competent to do either. A witness cannot be corroborated by proving that on other occasions he had made statements conforming to his testimony, for such statements are but hearsay; nor can one who introduces a witness directly attack his credibility by proving facts irrelevant to the issue." And *Williams* v. *State,* 79 Miss., 555; 31 South., 197.

It was error to refuse the instruction (numbered 15) asked by the defendant. The idea presented in this instruction is that, if Lester killed the officers, not because of anything Owens had told him to do, but merely and solely to protect Matthis, the appellant would not be responsible for that; and the testimony of Matthis furnished the defendant with a basis on which to predicate his right to this instruction. The fourteenth instruction granted for the defendant does not cover this precise proposition, and the refused instruction, being a correct proposition of law, ought to have been granted. The defendant has the right to have the jury instructed upon any theory that the testimony may reasonably present. It must be admitted that Matthis' testimony was certainly sufficient to justify the giving of this instruction. As to the truth or falsity of Matthis' testimony in this connection, we, of course, make no comment.

The jury first returned into court this verdict: "We, the jury, find the defendant guilty as charged, and ask for the mercy of the court." This clouded verdict needed to be cleared up, as held in *Smith* v. *State,* 75 Miss., 556; 23 South., 260. This jury had been fully instructed as to the form of the ver-

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Opinion of the court.

dict, as had the jury in the *Smith Case,* and what was said in the *Smith Case,* reviewing the authorities on that proposition (*Penn* v. *State,* 62 Miss., 477; *Shines* v. *State,* 42 Miss., 333; and *Gipson* v. *State,* 38 Miss., 310), is directly in point in this case. We stated then, and now reaffirm the proposition: "The thing to be ascertained is 'the will and intention of the jury' in their finding. That is what the court should know, that the proper sentence of the law may follow upon their actual finding, not upon what is not their actual finding. Of course, the legal effect of the verdict in this case, in the words used, is, by legal construction, death. But the words employed in a verdict are the mere vehicle for conveying the jury's will; and where there are words in the verdict raising an 'apparent cloud' as to what the actual intent of the jury is, the court, whether asked or not, should 'dispel that cloud,' and have the jury make plain their meaning. And the court, of course, had the amplest power to do this, and, if necessary, to send them back to the jury room to render a clear and unambiguous verdict; and most especially should this ample power be exercised in a capital case."

Following this announcement, in 75 Miss., 23 South., the learned court below sent the jury back to put their verdict in proper form, the court having first asked the jury what they meant by the "mercy of the court," and a member of the jury having said, "We thought he should have been put in the penitentiary." This occurred at 6 o'clock in the afternoon, and at 6.40 the jury returned a second verdict in the following words: "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court." When this verdict was rendered, one of the jurors, Simpson, said: "I would like to explain. Before we assessed any time, we knew we could not fix any length of time, and we thought by asking the mercy of the court it would be all right; we did not have the form properly drawn up." The jury did have the forms properly given in the instruction, and, if the learned circuit judge had

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Opinion of the court.

simply directed the jury to go back and read the instruction as to the form of their verdict, and then render a proper verdict, it would have been a very easy thing for the jury to have done that, if they had really agreed on a verdict; or if, as the record discloses was the fact, they had not really agreed on any verdict, a mistrial could have been entered. When this second verdict was rendered, the court first polled the jury in the usual way, and then each juror was asked what he meant by the verdict. Juror Frazier said that he "meant for the judge to fix the number of years, even if it extended to the life sentence"; Juror Higgins said that he "meant from twenty to twenty-five years in the penitentiary, and that he did not mean life imprisonment in the penitentiary"; Juror Puryear said that he "meant from twenty to twenty-five years, and did not mean life imprisonment"; Juror Wade said he "meant to leave the term of years to the judge, even if it meant life imprisonment"; Juror Eason said the same thing; Juror Crawley, that he "did not mean life imprisonment, but left it subject to the judge as to time"; Juror Hart said that he "meant about twenty-five years"; Juror Mobly said he "left it to the judge as to time, but did not mean life imprisonment," adding, "We did not expect it to be made for life is the reason we asked the mercy of the court"; Juror Hardin said, "I could not hang him, according to my view of the testimony, and thought he deserved ten or fifteen or twenty years in the penitentiary. I did not think he deserved life imprisonment"; Juror Morton said that he "left it to the court, except that he did not mean life imprisonment"; Juror Simpson said that he "left the time to the court, but intended a very short term — five, ten, or fifteen years—did not mean life imprisonment"; Juror Sharp said that he "meant twelve months in the penitentiary; he did not mean life imprisonment." Each and every one of the jury, asked by counsel for the state and for the defense, expressly stated that no one of the jury meant that the defendant should be hung. The court seems to have directed the verdict to be

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Opinion of the court.

entered up in the following form: "We, the jury, find the defendant, Whit Owens, guilty as charged in the indictment, and fix the penalty at imprisonment in the state penitentiary for life." It is perfectly obvious that no such verdict was rendered by the jury, and it is equally obvious that the jury had not agreed upon any verdict at all.

To show what an utterly clouded verdict it was, we have, on the one hand, the action of the court directing the verdict to be entered in the form we have just given, and sentencing the prisoner upon the verdict to imprisonment in the penitentiary for life; and we have the district attorney, on the other hand, actually excepting to the action of the court in not sentencing the prisoner to be hanged. It is plain that the court did what he did because he thought the legal effect of the verdict was imprisonment for life. It is also plain that the district attorney based his exception upon the idea that the legal effect of the verdict was a simple finding of guilty of murder, upon which the death penalty should follow. No more conclusive proof of the utterly clouded state of this verdict could be furnished than the spectacle of the judge and the district attorney disagreeing as to what the verdict meant. The only strange thing is how there could be any difference of opinion as to the real nature of the verdict. It seems to us perfectly plain that the jury had not agreed upon the number of years, differing about that from twelve months to life imprisonment, and hence that they had really reached no legal verdict upon which the judgment of the law could follow. It is the duty of the jury to sentence the prisoner to life imprisonment, where that is to be done — not the court. The learned judge below was entirely correct in refusing to enter the death penalty when every member of the jury said that was not his verdict; but he erred in treating the verdict as a sentence for life imprisonment at the hands of the jury. The matter was of exceedingly simple solution. It would have been perfectly proper for him to have taken from the charges for the state the one as to the form of their verdict,

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and directed the jury to retire, read that charge, and put their verdict in form. Jurors are men unlearned in the law, and there could be no possible objection to the court's selecting and handing to them the charge as to the form of their verdict when form was the only thing involved. Had this been done, the jury would very soon have disagreed, or returned a proper verdict. From the testimony, it would seem that they would doubtless have disagreed. At all events, the one result or the other was certain.

We are of the opinion that this verdict was not a legal verdict — not one upon which the judgment of the court could have been legally pronounced. The precise case was decided in *Weatherford* v. *State,* 43 Ala., 320, where the court said: "The appellant was indicted in the city court of Mobile for the crime of rape. On the trial, the jury returned a verdict in the following words, to wit: 'We, the jury, find the prisoner guilty, as charged in the indictment, and sentence him to imprisonment in the penitentiary.' Before he was sentenced by the court, the prisoner, by his counsel, moved to arrest the judgment for the following reasons: '(1) Because the verdict rendered in the case by the jury is contrary to law, and does not declare what the punishment shall be. (2) Because the court cannot pass sentence upon the verdict rendered in the case, the court having no power or discretion to fix the length of time of imprisonment, and the jury having to fix the same, it being their province to do so.' The court overruled the motion, and sentenced the prisoner to hard labor in the penitentiary for his natural life. The prisoner excepted to the ruling and sentence of the court. The judgment of the court was suspended, and the case is here for revision. Section 3661 of the code provides that 'any person who is guilty of the crime of rape, must, on conviction, be punished, at the discretion of the jury, either with death, or by imprisonment in the penitentiary for life, or by hard labor for the county for life.' The entire punishment for this crime is in the discretion of the jury, and the court has

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nothing to do in the matter, but to pronounce the sentence of the jury. The attorney general argues that the law determines the duration of the punishment, where it is either in the penitentiary, or hard labor in the county. This is true, but, notwithstanding, it must be found by the jury, and not fixed by the court. Who can tell but, if the jury had been instructed that imprisonment in the penitentiary must be for life, they might not have determined to inflict the milder punishment, to wit: hard labor for the county for life? But why speculate about this matter? The wiser and safer course is to do just what the law requires, and to do it in the way the law requires. We have determined at this term, in the case of *Edgar* v. *State,* a case very like this, that the jury must, by their verdict, determine both the character and extent of the punishment."

What is said in this case about the entire punishment being in the discretion of the jury, under the section cited from the Alabama code, applies perfectly to that part of a sentence in a murder case under our law which fixes the punishment at imprisonment in the penitentiary for life. Whether that shall be the sentence is for the jury, and not the court, to say.

Two things were made certain by the testimony elicited from the jurors in this case: First, that not a single juror meant by his verdict that the death sentence should be imposed; second, that ten of the jurors meant he should not be imprisoned in the penitentiary for life. We think it is equally certain that, not meaning he should be hung, and differing about how long he ought to be imprisoned in the penitentiary — from a twelve months' period to a life period — the jury had never really agreed upon any verdict. Had the court pursued the course indicated, there would have been a verdict upon which judgment could have been legally pronounced, or there would have been a mistrial. It was the duty of the court, under the circumstances, to have required the jury to go again to their room, read the charge as to the form of the verdict, and then return — if they agreed — a legal verdict in proper form.

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Brief for appellant.

There are other errors complained of, but, as they are such as would not likely occur again, we have noticed only those which are vital.

Reversed and remanded.

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WHITTINGTON OWENS v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Change of venue. Code* 1892, § 1411. *Two offenses.*

Where a defendant is indicted in the same county for two offenses and is entitled to a change of venue for the trial of one of them, under code 1892, § 1411, regulating the subject, he should on his application be granted a change of venue for the trial of the other, if the connection between the offenses be such that the prejudgment, grudge or ill-will which entitled him to the change granted, operate adversely to him in the other case, although the commission of the crime therein charged did not produce such prejudgment, grudge or ill-will.

FROM the circuit court of Lafayette county.

HON. PERRIN H. LOWREY, Judge.

Owens, appellant, was indicted and convicted of murder, and appealed to the supreme court. The facts are stated in the opinion of the court.

For a history of appellant's several trials, see *Owens* v. *State, ante,* 19; *Owens* v. *State,* 80 Miss., 499; *Matthis* v. *State,* 80 Miss., 491, and the footnote to last case, at page 493.

H. D. Stephens, for appellant.

Under the facts, appellant was clearly entitled to a change of venue. The condition of the public mind in Lafayette county was so adverse to him that it was with difficulty that he was protected from a mob. The court below, because of the prejudgment of his case by the people of that county, and the grudge and ill-will borne towards him by that people, adjudged

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Brief for appellee.

that appellant was entitled to a change of venue in the cases against him for killing the Montgomerys.

In the present case, where the change of venue was denied appellant, the witnesses are the same as those against him in the Montgomery cases; there is a decided connection between the causes. If appellant be guilty, all three of the murders were committed in pursuance of a common design. It is true the offense in the present case was committed before the Montgomerys were killed, and that the killing of Williams attracted but little public attention, and that the prejudgment of appellant and the grudge and ill-will borne against him by the people did not come into existence until after the Montgomerys were murdered, but it all exists now, and existed with great intensity when the change of venue in this case was applied for by appellant. It is impossible to separate the cases in the public mind. The court below had a wrong conception of the law of the case. It proceeded upon the idea that a change of venue should be denied, no matter how much prejudice, prejudgment, grudge, of ill-will might be entertained by the public against appellant, unless such prejudgment, ill-will, etc., grew out of the particular charge to be tried. No conception could be more erroneous. Any conception is erroneous which will turn an accused over to a howling mob of infuriated men for execution, although the process be called a trial.

W. V. Sullivan, on same side.

[Mr. Sullivan's brief was withdrawn or lost from the record before it reached the reporter.]

William Williams, attorney general for appellee.

The testimony shows that there was a sentiment in the county of Lafayette against appellant on account of the murder of the Montgomerys, but that the murder of Hampton Williams and appellant's connection with same had been discussed very little, and the testimony offered for and against the application for a

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Opinion of the court.

change of venue shows beyond a doubt that the murder of Hampton Williams attracted but little attention.

"In reviewng the action of the circuit court in refusing defendant's application for a change of venue where a motion for a new trial has been overruled, and the whole evidence in the record, this court will not look alone to the evidence before the court on the application for a change of venue, but will judge from the whole case whether an impartal trial was had." *Cheatham* v. *The State,* 67 Miss., 335.

If there was no abuse of the discretion vested in the trial court, this court should not reverse the judgment of the trial court on this application and motion. *Stewart* v. *The State,* 50 Miss., 587; *Bishop* v. *The State,* 62 Miss., 289.

The record shows that after the examination of about forty-five persons, the jury of twelve had been empaneled and was accepted by both the state and the defendant. The court's attenton is directed to the fact that in empaneling the jury, appellant exercised only seven peremptory challenges.

It is submitted that every case should stand upon its own merits, and that the facts in this case show that appellant was tried by a fair and impartial jury. If this contention is true, then the third assignment of error is not tenable.

Argued orally by *H. D. Stephens* and *W. V. Sullivan,* for appellant, and *William Williams,* attorney general, for appellee.

TERRAL, J., delivered the opinion of the court.

The appellant, Whittington Owens, was convicted in the circuit court of Lafayette county of the murder of Hampton Williams, and was sentenced to be hanged. From that sentence he takes this appeal.

One of the principal grounds of complaint which he makes is the refusal of the court to grant him a change of venue for the trial of said cause. The present indictment against Owens related to the killing of Hampton Williams, who was accidentally

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shot and killed by Orlando Lester, in the effort to kill Walter Jones. The killing of Williams created but little agitation in the public mind, but the killing of John A. and Hugh Montgomery, two officers of the law, committed not long thereafter, created great excitement. Owens was also indicted for their murder, which was committed in the process of arresting William Matthis, also charged jointly with Owens and Lester in the commission of the offense. Now, Hampton Williams was killed in the effort to kill Walter Jones, who was a witness against Lester, Matthis, and Owens, one or all, for the unlawful distillation of spirituous liquors. There seems, therefore, to have been a general connection of purpose in the attempted killing of Walter Jones and the killing of the Montgomerys. The several killings were a part of a scheme to rid Lester, Matthis, and Owens of all prosecution for the unlawful distillation of liquors. All these crimes were committed in Lafayette county, and were there triable accordng to the rules of law. Upon the killing of the Montgomerys, great agitation arose in the county. The defendant, with others, was arrested and carried to Oxford, the county seat. Great masses of citizens assembled there, and much excitement prevailed. A special term of the circuit court was immediately called. Indictments were found aganst Owens for the murder of the Montgomerys, and for the murder of Hampton Williams. Upon the application of Owens, a change of venue was properly granted to him as to the cases against him for the murder of the Montgomerys, but his application for a change of venue in the Williams case was overruled.

We are not able to escape the conclusion that all the reasons that support the judgment of the court for a change of venue in the two Montgomery cases exist also in reference to the Williams case. The statute (code 1892, § 1411) gives three grounds for change of venue: (1) A pre-judgment of the case; (2) a grudge; and (3) ill will to the defendant. Now, it must be admitted that ill will or a grudge to the defendant may grow out of matters not intimately connected with the case, and inde-

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pendent of any relation of the case of the killing of Williams to the cases of the killing of the Montgomerys. We think a change of venue should have been granted. There is yet a close relation between the alleged murder of Williams and the murder of the Montgomerys. If in no other aspect they are closely related, they are very much alike in the evidence offered for the conviction of the defendant. There is no direct proof that Owens was connected with either crime; his relation to each crime is made up of the evidence of Lester and of William Matthis. Therefore, if the excitement and pre-judgment of the Montgomery cases existed in these cases, it must have found full and free scope for its operation in the Williams case, as soon as the evidence upon which it was based was laid before the court and jury. It is conceded that pre-judgment existed in the Montgomery cases, and it existed in these cases merely because Orlando Lester and William Matthis declared him the moving spirit that compassed their death. Why, then, did not this spirit of pre-judgment in the public mind catch a new flame as soon as the public saw it had a foundation as potent in the Williams case as it had in the Montgomery cases — a foundation in the one case exactly like the foundation in the other — the murder of Williams and the murder of the Montgomerys having for its purpose a riddance of Matthis, Lester, and Owens, one or all, of any prosecution for unlawfully distilling liquor?

In *Cavanah* v. *The State,* 56 Miss., 307, it was said that the "undue prejudice" meant by the statute was such as would be likely to be so felt in the jury box as to prevent the accused from having a fair and impartial trial by the evidence and the law. We cannot doubt but that the jury box would have felt the influence of the public pre-judgment against Owens in his trial for the murder of the Montgomerys, and its influence was equally prevalent on his trial in the case before us.

Reversed and remanded.

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Statement of the case.

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ISAAC N. ELLIS v. J. B. GREAVES, DISTRICT ATTORNEY.

1. QUO WARRANTO. *Office. School trustee. Code* 1892, § 3520.

A trusteeship of a public school is an office within the meaning of code 1892, § 3520, providing a remedy by *quo warranto* against persons unlawfully holding office.

2. CONSTITUTIONAL LAW. *Constitution* 1869, *art.* 8, *sec.* 1, *constitution* 1890, *sec.* 201. *Uniform system of public schools. Departures from general school law.*

Constitution 1869, art. 8, sec. 1 (constitution 1890, sec. 201), making it the duty of the legislature to establish a uniform system of public schools, prohibited the appointment by legislative act of designated persons as trustees of a public school for a term of twenty years, and granting them power to fill vacancies in their number, exclusive control of the school and other powers not conferred on trustees of public schools generally.

3. SAME. *Laws* 1888, *p.* 173, *ch.* 198. *Code* 1892, § 4008.

While Code 1892, § 4008, regulating the election of public school trustees generally, but providing that existing trustees of certain separate school districts should remain in office according to the terms of their appointment, did not supercede laws 1888, chapter 148, appointing and conferring extraordinary powers upon the trustees of the Hazlehurst public school, yet said act of 1888 was and is violative of constitution of 1869, art. 8, sec. 1 (constitution 1890, sec. 201), requiring a uniform system of public schools.

FROM the circuit court of Copiah county.
HON. ROBERT POWELL, Judge.

Greaves, district attorney, appellee, was plaintiff in the court below; Ellis, appellant, was defendant there. The suit was a *quo warranto* proceeding to remove Ellis from the office of trustee of the Hazlehurst public school. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The case was tried upon an agreed state of facts, published in full by order of the court, which was as follows:

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Statement of the case.

AGREED STATE OF FACTS.

"In 1888 the legislature of the state passed an act 'to authorize the board of mayor and aldermen of the town of Hazlehurst, Miss., to issue the bonds of the said town for the purpose of purchasing a site and erecting buildings thereon for the public schools of said town, and for other purposes.' See Acts 1888, p. 173, c. 148. And it is agreed that the whole act is a part of these agreed facts, though not set out in full here. After providing for the issuance of $15,000 in bonds, for the purpose as indicated in the act, by the board of mayor and aldermen of the said town of Hazlehurst, the rate of interest, the time the bonds should run, etc., and giving the mayor and board of aldermen certain powers therein named with respect to the then school building, the act proceeds, in section 6, as follows: 'Be it further enacted, that L. B. Harris,' etc., naming therein thirty-two others, Isaac N. Ellis being one of them—'be and they are hereby appointed a board of trustees of the public schools of the town of Hazlehurst, and shall hold their office for twenty years, and until their successors are elected; provided, no person shall hold the office of trustee unless they reside within the corporate limits of said town, and in case of any vacancy caused by death, resignation or removal from the corporate limits of the said town, or from any other cause, the remaining members of said board of trustees shall meet on the first Monday in May, 1888, and organize by electing a president and secretary, who shall hold their office for one year, and a majority of said board shall constitute a quorum. Said board may meet at any time upon the call of the president. They shall, on the first Monday of May, 1888, and annually thereafter, elect by ballot seven of their number, who shall constitute a board of control for the public schools of said town, and shall hold their office for one year, and until their successors are elected.'

"It is agreed that Isaac N. Ellis was appointed a member under the original act, and has been a member of the board of

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Statement of the case.

trustees ever since, and is also one of the board of control authorized to be selected under the above act, and that he was regularly selected, agreeably to the provisions of the said act, by other trustees. It is also agreed that the number of trustees now acting is only twenty-six, and has never exceeded that number, for the reason that, when the trustees originally organized under said charter, they found that all of the balance of the members named in said charter were non-residents of the town of Hazlehurst, and not eligible under the terms of the charter to act as trustees. That since said organization there has never been any election of trustees to fill the vacancies occasioned by the ineligibility of those who were non-residents of the town, but the original number of twenty-six trustees as organized under the act has been kept up, except, perhaps, in one or two instances, in the case of death or removal, the vacancy was not promptly filled through oversight or inadvertence.

"It is also agreed that only fifteen of the original trustees who organized under the original act are now acting as such, the balance having died, resigned, or moved away, and their places having been filled under the act of 1888. Since the code of 1892 was adopted, five members of the acting board have been elected as members of the board of trustees, and are now acting as such with said board, and their actions are governed by the act of 1888, and not by the code chapter on schools.

"It is also agreed that, in 1900, Isaac N. Ellis was elected as a member of the board of aldermen of the town of Hazlehurst, and that he qualified as a member of the same, and is now on the board of aldermen of the town of Hazlehurst, and acting in that capacity for the said town, and is also a member of the board of trustees for the public schools of said town. It is also agreed that by acts 1890, p. 186, c. 135, § 3, the following power is given the board of control of the said town of Hazlehurst, of which Ellis is a member, to-wit: That the board of control of the said town of Hazlehurst shall annually, prior to the time the board of mayor and aldermen of the said town

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Brief for appellant.

makes the levy for the corporation taxes in each year, make an estimate of the amount of money necessary to carry on the public schools of the town of Hazlehurst for the ensuing year, and it shall be the duty of the said board of mayor and aldermen to levy a tax upon the persons and property of the said town, subject to other taxation, sufficient to raise the amount so reported by them by the said board of control, to be collected the same as other taxes are now collected; said sum so raised to be used by the said board of control to carry on the public schools of said town. Should the board of control, from any cause, fail or neglect in any year to make and report said estimate of the amount of money necessary to carry on the public schools, then the board of mayor and aldermen shall make such levy as will, in their judgment, be necessary to carry on said schools for the ensuing year. All of the foregoing facts are agreed to, subject to objections for irrelavancy, incompetency, and insufficiency.

"(Signed) R. B. MAYES, *Attorney for Plaintiff.*
J. S. SEXTON, *Attorney for Defendant.*"

J. S. Sexton, for appellant.

Of course it is well understood that statutes are not to be set aside as unconstitutional unless they are manifestly so, and, for my part, I have not been able to find any apparent conflict between this statute and any constitutional provision. As was well said by Judge Campbell in the case of *Wynn* v. *State,* 67 Miss., 317, "It may be difficult to determine the precise meaning of the expression 'uniform system of free public schools' as used in the constitution," but in that case the court held that the acts of 1888, p. 36, providing for the election of county superintendents of education in some, but not all, of the counties, did not violate the constitution in respect to the "uniform system of free public schools" provided for thereby, and when it is remembered that a very large number of separate school districts were organized under the constitution of 1869

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with substantially similar provisions to those found in the act complained of, and when it is further remembered that, notwithstanding this contemporaneous construction of the constitution of 1869 by all of the legislatures held in the state from that date to the time when the constitutional convention of 1890 adopted the constitution of that year, it is remarkable, to say the least that, if such statutes trenched upon the constitution, it was not discovered by any of said legislative bodies, and it is still further remarkable that the convention of 1890, in section 201 of the constitution enacted by it, should have re-enacted, word for word (omitting the preface), section 1 of article 8 of the constitution of 1869, without any reference to such conflicts or without the addition of such precautions as would have prevented such conflicts in the future.

The first legislature which met in the state, after the constitution of 1869 was adopted, in the acts of 1870, incorporating "Whitworth College," "Meridian Female College," "Verona Female College" and several others, enacted provisions for the selection of the trustees thereof, precisely of the same character as the provisions of the charter of the Hazlehurst high school, which are now objected to, and this practice has continued in this state ever since. In fact, if there is any one thing about which the legislative power had never been questioned in this state, it is its power to provide for the selection of trustees of schools and officers of private corporations according to its own will. The University of Mississippi furnishes another illustration here, because, notwithstanding its original charter provided for the appointment of the original trustees, which was made by the legislature, and for filling vacancies by their own body, chapter 68 of the acts of 1870 provides that all of said appointments shall be made by the governor of the state, and my recollection is, though I have not taken the pains to verify it, that at one time during the reconstruction regime the legislature provided for the selection of the trustees of the university by the legislature itself.

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Brief for appellant.

There is no mode provided for in the constitution of 1869 by which the trustees of the public schools of the state, and the separate school districts thereof, are to be selected or vacancies in such boards supplied, and the legislature was left perfectly free in the matter of making such selections and filling such vacancies.

It is stated in the opinion of the circuit court that the powers conferred upon this board of trustees are "powers which vitally effect the domestic affairs of the town of Hazlehurst." That the trustees of the school have the power, among other things, "to assess an annual tax upon all of the property of the town, leaving to the people no right to protest at the ballot box, or elsewhere, and only the poor privilege of footing the bills." I grant that the board of trustees has considerable power, but not a whit more than is necessary for the successful administration of the school committed to its charge. I deny the legal proposition that the board of control of the Hazlehurst high school can assess an annual tax upon anything or anybody, though it would have been perfectly permissible for the legislature to have provided for such assessments by this body if it had seen fit.

The conclusion of the whole matter is that there is no constitutional inhibition found in the constitution of Mississippi (1869), and the legislature has seen fit to repose the authority vested in the act complained of in the board of trustees, one of whom are sought to be ousted, in this proceeding, and that is the end of it. In this connection I call the attention of the court to the case of *Chrisman* v *Brookhaven,* 70 Miss., which, though not directly in point, is valued and persuasive in the present controversy, showing the trend of our court in such cases.

It is true that the constitution provides for the establishment of "A uniform system of free public schools," but this does not mean that there shall be a uniform system of electing trustees, any more than that there shall be a uniform system of

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electing superintendents of education, or of building houses for school purposes. All of these are mere instruments in one general uniform scheme, and the uniformity required refers to the universality of the system to be provided for and of taxation to be exacted for that purpose, leaving the legislature all necessary discretion as to the details of working out that system.

When the construction of the law at that time is remembered, the construction of section 4007 of the code of 1892 is rendered very simple. It provides for the selection of five trustees to look after the interest of the schools in separate school districts under formal conditions, and where no other system of selection is in vogue under some other act.

This is made clear when section 4008 is construed in connection therewith. This section provides the tenure of the office of such trustees as are provided for in section 4007, and the method of filling vacancies occurring in the board of trustees therein provided for; but, recognizing the conditions above mentioned, and the separate school districts already in existence under special acts, such as ours, and not wishing to interfere therewith, and desiring that both systems should co-operate harmoniously, the legislature wisely provided for such conditions and against the possibility of conflict in the closing paragraph of section 4008, which is in these words: "But existing trustees of separate school districts shall remain in office according to the terms of their appointment or designation unless selected under the general law, and where they are numerous and authorized to act by a smaller number to be selected by them, and they may continue to do so."

Here was a plain legislative declaration, that, as to such trustees as had been selected by the general law for separate school districts, created under such general law, a new system was enacted, insofar as it was a new system, by section 4007 of the code of 1892. But special laws in reference to separate school districts were not to be interfered with, and the trustees thereof were to continue to have the same powers which they previously had.

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Brief for appellee.

Robert B. Mayes, for appellee.

The officers, school trustees, appointed by the legislature of 1888, are not the officers of the municipality, but they are the officers of the state legislature. The people of Hazlehurst have had no voice in this appointment, but the right to participate in any further selection of these officers has been taken away from them. This sort of legislation is not the legislation of modern times, under a free and independent government, but is a species of legislation that has its place among the dark ages! If the appointment of trustees can be made in this way, constitutional provisions mean nothing, and the right of local self-government, having its birth at the dawn of civilization; recognized in the policy and history of our own laws to the broadest extent; treasured and conceded without question by our ancestors; lending efficacy to the war of our independence; giving strength to our state government to this day, and furnishing indispensable aid to our state in the preservation of peace and good order in the more thickly settled portions of the state, represented by the cities, towns and villages; this well recognized right is then but a mockery and a dream!

The court will bear in mind the fact that these trustees were not only appointed by the legislature, the people having no hand in their selection, but the power is forever taken away from them to ever have any voice in their selection. They, the trustees, are given the power of electing their own successors, and they, and not the people, whose money they spend and whose children attend this school, are given the power of electing others to fill vacancies occurring in the office of trustee.

Nor is this all, but, in the act of 1890, amendatory to the act of 1888, on p. 186, c. 135, the board of control of this school are given the power of taxation. Section 3, act of 1890, chapter 135, says: "The board of control of the public school of the town of Hazlehurst shall annually, prior to the time that the board of mayor and aldermen of said town makes the levy for corporation tax in each year, make an estimate of the

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Opinion of the court.

amount of money necessary to carry on the public schools of said town for the ensuing year, and it shall be the duty of the board of mayor and aldermen to levy a tax upon the persons and the property of said town, subject to other taxation, sufficient to raise the amount so reported to them by the board of control, to be collected the same way as other taxes are collected."

It will be seen that the trustees have not only the absolute control of the school, with self-perpetuating power, but they have also the power of unlimited taxation. It seems to me, that a more despotic power was never attempted to be exercised against people under a free government than this. Their officers of the town are appointed for them; the state does this; the power of self-perpetuation is given to the local officers so appointed; they are given the power of unlimited taxation against the people, and the right to control their school is not to be confided to them at any future time, but these officers are to serve on indefinitely! *Leroy* v. *Hurlbut,* 9 Am. Rep., 103; *Holt* v. *Dennett,* 4 L. R. A., 75.

WHITFIELD, C. J., delivered the opinion of the court. The learned circuit judge who tried this case, said in the course of his opinion:

"The act under consideration devolves large powers upon its creatures, the trustees, for a long period of time, so long that, with the average man, the appointment would be for life, which is inhibited by the constitution—powers which vitally affect the domestic affairs of the people of the town of Hazlehurst, powers which have hitherto belonged exclusively to the local municipal government. It gives to the trustees the exclusive control of the public schools of the town; to farm them out, and rent the buildings according to their judgment, for a period of ten years; to appoint teachers, who, under the law, stand in *loco parentis* to the educable children of the town; to assess an annual tax upon all the property of the town, leaving to the

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people no right to protest at the ballot box or elsewhere, and only the poor privilege of footing the bills. With so large and important a part of local government destroyed, the question might well be asked, could not the legislature abolish all municipal offices, and administer the municipal government by agents of its own appointment? In other words, is there such a thing as local self-government which is inherent in the people, and which exists independent of constitutional guaranties?"

It is true, as to one of the statements, that the executive board of control of the Hazlehurst high school did not actually levy the tax; but it is made the "duty" of the board of mayor and aldermen to levy the tax to meet their estimate; so that practically it comes to about the same thing. The enumeration by the circuit judge of the extrarodinary powers conferred by this act is strictly correct in all other particulars.

On the agreed state of facts, which the reporter will set out in full, it is enough for our purpose to say that section 6 of said act of 1888 not only provides for induction into office of the trustees, but confers upon them most peculiar and extrarodinary powers—powers wholly different from the powers conferred upon trustees of common schools by the general law in force at that time or now. The purpose of the constitution of 1869, art. 8, § 1, declaring that it should be the duty of the legislature to establish a uniform system of public schools, was to make the system uniform in all that related to the executive administration of the common schools of the state. The purpose was to secure a uniform administration of the common schools. It was meant that the "system" should be administered uniformly, on a uniform plan, the same throughout the state. It is impossible to conceive how there can be any such uniform system where the trustees of some of the common schools are chosen in the mode provided for in the general law, and vested only with certain powers therein prescribed, carefully limited and defined, and the trustees of others—confessedly public schools, parts of the common-school "system"—are not only chosen in a wholly

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different way from that in which other trustees are chosen, but also given the power to perpetuate themselves indefinitely; practically the power of taxation also, and other powers not conferred upon trustees selected under the general law. The object of the constitution was perfectly plain, and no amount of statement can either make it plainer or obscure that plainly declared purpose.

The case of *Wynn* v. *State,* 67 Miss., 317; 7 South., 354, holds only that the provision of the constitution of 1869 under consideration was not infringed by a statute which related alone to the method by which county superintendents of education were to be inducted into office. It was there said: "The source from which he derives his right to his office has no connection with or relation to his duties in office. They are prescribed by law, and the uniform system of free public schools is in no way dependent on, or affected by, how the county superintendent gets into office."

Nor does the case of *Chrisman* v. *City of Brookhaven,* 70 Miss., 477; 12 South., 458, in any way conflict with our view. The only thing held by that case is simply "that, while the legislature may not authorize a diversion of the common school fund, it may empower local authorities to provide schools outside the established system, and to pay therefor by taxation."

We are dealing here, not with a school separate and independent of the common school system, but with just that very thing, to wit, a high school, which is a part, and recognized as a part, and admitted by the argument of counsel for appellant to be a part, of the common school system of this state. The question here is not what the legislature might do as to establishing private schools outside of the system of common schools, but whether, in dealing with a school confessedly a part of the free common school system of this state, it can be permitted to clothe trustees of one common school with extraordinary powers denied to trustees of the common school system by the general law. It would be worse than idle to attempt to define the latter

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as not infringing that uniformity of system which art. 8, sec. 1 of the constitution of 1869 imperatively commanded the legislature of the state "to establish." What is said by the learned counsel for appellant about the first legislature which met after the adoption of the constitution of 1869, approving, in the acts of 1870 incorporating Whitworth College, Meridian Female College, and Winona Female College, of the selection of trustees in the manner provided for by this act of 1888, is quite beside the mark. Those institutions were colleges, not parts of the common school system of the state, and, of course, might have been dealt with by the legislature wthout regard to the inhibition in said art. 8, sec. 1, of the constitution of 1869.

We concur entirely with the court below in its holding that section 4008 of the code of 1892 did not displace the act of 1888, and in holding that the trustee of a public school is an officer within the meaning of the statute providing the remedy by *quo warranto*. We say nothing as to the ground on which the learned circuit judge rests his opinion in the case, to wit, that the act of 1888 violated the fundamental right of the people to local home rule. He has reached the right conclusion, but we prefer to rest our reason for that conclusion upon the ground that the provisions of the act of 1888 under review plainly violated art. 8, sec. 1, of the constitution of 1869 in respect to the establishment of a uniform system of public schools, and are therefore unconstitutional and void.

The judgment is

Affirmed.

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Brief for appellant.

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IRA F. CHEAVES v. SOUTHERN RAILWAY COMPANY.

RAILROADS. *Constitution* 1890, *sec.* 193; *code* 1892, § 3559. *Fellow servants.*

Under constitution 1890, sec. 193, and code 1892, § 3559, providing that every employee of a railroad corporation shall have the same remedies for an injury suffered from the act or omission of the corporation or its employees as allowed to other persons not employees, where the injury results from the negligence of a superior agent or officer or one having the right to control the service of the party injured, a declaration in a suit by a fireman charging that he was injured by the negligence of the engineer who was a superior, having the right to control plaintiff's service (using the language of the constitution and statute in making the charge) is not demurrable.

FROM the circuit court of Lowndes county.

HON. EUGENE O. SYKES, Judge.

Cheaves, appellant, was plaintiff in the court below, the railway company was defendant there. The plaintiff's injury was serious, the loss of a leg. The court below sustained a demurrer to the declaration and dismissed the suit, and plaintiff appealed to the supreme court. The facts are stated in the opinion of the court.

Orr & Harrison, Hoke Smith and *H. C. Peeples,* for appellant.

The kernel of the case lies in the claim made in the declaration that Cheaves, while in the discharge of his duties as fireman upon an engine of defendant at night, within the corporate limits of the city of Columbus, lost his leg because of the negligence of the engineer of said engine in running the engine into an engine and cars upon a track of defendant in said city; in other words, the fireman seeks to recover for an injury sustained because of the negligence of the engineer.

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Brief for appellant.

No question was made in the court below but that the allegations of negligence were sufficient, but the point upon which the case was dismissed was that Cheaves and the engineer were fellow servants, and hence one could not recover for an injury sustained by reason of the negligence of the other.

We call especial attention to the fact that in the declaration it was distinctly charged that Cheaves was injured by the negligence of a superior, and that the engineer had the right to control or direct his services.

In the face of such distinct allegations of the relations of this engineer and this fireman, will a suit be dismissed because of supposed relations of engineers and firemen generally, even if such supposed relations could justify the dismissal under the present law of Mississippi?

There was no demurrer to the declaration as amended for lack of particularity. The demurrer was general.

Let us come to the consideration of cases decided since the adoption of the constitution.

In *Evans* v. *L., N. O. & T. Ry. Co.,* 70 Miss., 527 (12 So. Rep., 581), it was held that a brakeman could not recover for an injury caused by the negligence of an engineer, because the engineer was not the superior of the brakeman, nor did he have the right to control or direct the services of the brakeman. It did not appear in that case that the relation of the engineer to the brakeman was defined by any particular rule of the railroad company, or was in any way different from the ordinary and usual relations of such employees. If the case had been one of conductor and brakeman, under the ordinary relations of these employees, and the rules generally in force on railroads as to them, the case would have been one which, it seems, would have been within the plain language of the constitution. See *R. & D. R. Co.* v. *Rush,* 71 Miss., 987.

In *Illinois, etc., R. Co.* v. *Price,* 72 Miss., 862 (18 So. Rep., 415), it was held that the yardmaster and switch engine foreman (who is equivalent to a conductor) were the superior serv-

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Brief for appellant.

ants to a brakeman, and for their negligence in failing to call his attention to a danger in coupling cars he could recover.

In *Farquhar et al.* v. *Ala. & V. Ry. Co.,* 78 Miss., 193 (28 So. Rep., 850), it was held that a yardmaster riding on a switch train was a fellow servant of the engineer. No attempt was made to bring that case under the constitution, but it was sought to induce the court to review previous decision as to who were fellow servants outside of the constitution.

In *Fenwick* v. *Illinois, etc., R. Co.,* 100 Fed., 247, a case arising in Mississippi, it was held that a member of a switching crew was a fellow servant of another of the crew, who had temporarily been made foreman, and was not within the constitutional provision. It appeared that the temporary foreman had no authority to command, was of the same rank, and had no power to employ or discharge.

This decision is not controlling here, and, while it is from a court of high rank and ability, we venture to say that it is of somewhat doubtful authority, since the fact that one was only temporary foreman should not matter, and the right to employ or discharge is not controlling as to superiority or the right to direct the services of another.

The cases from Mississippi, above mentioned, are all we have been able to find which appear to have any bearing on the question made in the present case, and it seems very clear that none of them determine it.

As we are without direct authority in Mississippi, let us turn to cases decided elsewhere, which, while not binding, are because of the similarity of the question made and the standing of the courts by which they were decided, highly persuasive.

In *Gal., H. & L. A. Ry. Co.* v. *Ford,* 46 S. W., 77, it was held that the question of fireman and engineer, being fellow servants, was properly for the jury, there being conflicting evidence as to whether the fireman was not subjected to the superintendence, control and direction of the engineer in such manner as to change the relation of fellow servant, by rule of the railroad relative to engineers.

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Brief for appellant.

In *Houston & T. C. R. Co.* v. *Stuart,* 48 S. W., 799, it was held that "an engineer, since he has authority to direct the fireman in the performance of his duties is not his fellow servant." The supreme court of Texas, in considering the case on writ of error (50 S. W., 333), held that the conclusion of the court of civil appeals on this point was not erroneous. The statute of Texas uses the language: "Authority of superintendence, control or command, or with authority to direct." Rev. Statutes of Texas, 1895, art. 4560.

In *St. Louis, etc., R. Co.* v. *Tuohey,* 67 Ark., 209 (54 S. W., 577), it was held that when it was the duty of an engine foreman and his crew to do any work needed in the yards, and the foreman had no power to employ the men, but only reported them for negligence or refusal to do their work, he was a vice-principal as to the crew, under the fellow servant act of that state. The language of that act on the material point is: "Authority of superintendence, control or demand . . . or with authority to direct any other employee, are vice-principals . . . and are not fellow servants."

In *Davis* v. *N. Y., N. H. & H. R. Co.,* 34 S. E., 1070 (159 Mass., 532), the supreme court of Massachusetts held that a foreman of a section gang who does no work but only looks on to see how it is done, is a person exercising superintendence under the employer's liability act of that state; and that an engineer is the person who had charge or control of the train under that act, so far as giving signals, or slacking speed at the approach of danger is concerned. The employer's liability act of Massachusetts is similar to that of England and Alabama.

In *C., H. & D. R. Co.* v. *Margrat,* 37 N. E., 11 (51 Ohio St., 130), the supreme court of Ohio held that an engineer in charge of a locomotive who has authority to direct or control a fireman on the same locomotive is a "superior" within the meaning of the Ohio statute of April 2, 1890 (87 Ohio laws, 150). The language of that statute is: "Having power or authority to direct or control . . . is not the fellow servant but superior of such other employee."

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Brief for appellant.

In *Union Pac. Ry. Co.* v. *Doyle,* 70 N. W., 43; 50 Neb., 555, it was held that it does not follow that one employee is not a vice-principal as to another because not vested with authority to hire and discharge such other. Further, that the most satisfactory evidence that one is the vice-principal is that his co-employees are under his supervision, his control, and subject to his orders and directions.

In *Crisswell* v. *Montana, etc., Ry. Co.,* 42 Pac., 767; 17 Mont., 189, it was held that both the conductor and engineer of a train are the superiors of a brakeman on the same train, within the meaning of the statutes of Montana of 1887, section 697 providing that "the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior . . . as if such servant or employee were a passenger."

In 42 Fed. Rep., 483, it was held, under the same Montana statute, that a fireman could recover for the negligence of an engineer, they not being fellow servants under said statute.

A similar rule as to the same statute was made in 63 Fed., 114.

In *Rutherford* v. *So. Ry. Co.,* 56 S. C., 446; 35 S. E., 136, it was held that though one was a fellow servant of another and engaged in the same department of labor, he could recover for the negligence of such other if the latter had a right to direct his services. This holding was made under the constitution of South Carolina, which is identical in language with that of Mississippi.

There is a similar ruling in *Bussey* v. *C. & W. C. Ry. Co.,* 30 S. E., 477; 52 S. C., 438.

In the case of *Pierce, Receiver,* v. *Van Dusen,* 78 Fed., 693, it was held that a brakeman could recover for injuries received through the negligence of his conductor, under whose control and direction he was when injured; and that the negligence of a fellow servant for which the employer is made liable by

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Brief for appellant.

said statute is not merely negligence in the performance of a duty imposed on the master personally, but negligence in the performance of work pertaining to the negligent employee and others in the same work. This decision was by the circuit court of appeals of the Sixth circuit, and the opinion was delivered by Harlan, circuit justice.

In *C., H. & D. R. Co.* v. *Thiebaud,* 114 Fed. Rep., 918, it was held that the provision in the statute of Indiana (Laws, page 295), allowing recovery by one employee for injury sustained through the negligence of a co-employee, "and the person so injured obeying or conforming to the order of some superior, at the time of such injury, having authority to direct," was applicable, though the person injured was not acting at the time under any special direction of a superior, but merely acting in the line of his duty as an employee.

The statutes of Utah (Rev. Stat., 1898, sections 1342, 1343) provides that "all persons engaged in the service of any . . . corporation . . . who are entrusted by such corporation . . . as employer with the authority of superintendence, control or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice-principals of such employer and are not fellow servants." A fireman was killed by injuries which he received in a collision caused by the negligence of his engineer in running his engine too rapidly in approaching yard limits. The court held his administrator could not recover, notwithstanding the fact that the negligence was committed while the engineer was discharging the primary duties of the engineer and not the positive duties of the master. It was held, further, that the master was liable for the negligence of said superior servant, the engineer, whether the negligence was committed while he, the engineer, was exercising his authority to command or superintend others or not. This decision was made in the case of *So. Pac.* v. *Schoer,* 114 Fed. Rep., 466, by the circuit court of

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Brief for appellee.

appeals of the Eighth circuit, a court of high ability, and certainly not known to be too favorable to the claims of employees.

It is said the statute is a plain departure from the general rule of law, that there was no ambiguity in the terms of the statute, no uncertainty in its meaning, and no possible doubt of the purpose of the legislature in enacting it; that it was too positive to be disregarded, too plain for construction, and its manifest legal effect could not be ignored. Further, that to write into the statute, that the master would not be liable unless the negligent servant was actually engaged in exercising his authority of superintendence and control, would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms, and of the intention of the legislature, which its words clearly disclose.

Cannot the language of the circuit court of appeals be properly applied to the constitution of Mississippi? Are not the words of that instrument too positive to be disregarded and too plain for construction?

Catchings & Catchings, for appellee.

We regard it as settled law in this state that, notwithstanding the modification contained in section 193 of our constitution, an engineer and a fireman engaged in operating the same engine are fellow servants.

In *Railway Company* v. *Hughes,* 49 Miss., 285, after an elaborate inquiry into the whole question, the doctrine as to fellow servants was thus laid down:

"Who are 'fellow servants' within the rule? Those who are co-working in the same common enterprise, under the same master and compensated by him. Differences in wages and work do not affect the question, if the general business is the same. The conductor, engineer, brakeman and fireman are fellow servants with the same employees on every train. So they are with the switch-tenders, the track repairer, or watcher of trains to give signals, is in a common employment with the engineer, conductor and fireman of a train."

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Brief for appellee.

Under the rule thus laid down, clearly the appellant makes no case for himself. How far has this rule been modified by section 193 of our constitution? It is only so modified as to allow an action by one employee for an injury from the negligence of another where that other is a superior agent or officer, or a person having the right to control or direct the services of the party injured, or where the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. As the engineer and the appellant were engaged about the same piece of work and on the same train of cars, and in the same department of labor, we are left only to inquire as to whether the engineer was a superior agent or officer, or as to whether he had the right to control or direct the services of the appellant within the intent and purpose of this section of the constitution.

We think that the opinion in *Evans* v. *Railway Company*, 70 Miss., 527, answers this inquiry in the negative. In that case the plaintiff was a brakeman and was injured by the negligence of the engineer, who had signaled for brakes, and, while they were being applied in pursuance of the signal, caused a movement of the train without proper warning, whereby the plaintiff was hurt. It was argued with great earnestness by counsel for the appellant in that case that the engineer was a superior of the brakeman within the meaning of the constitution, for the reason that in the matter of putting on and taking off brakes, the work in which the appellant was engaged when he received his injury, he was under the absolute control of the engineer, whose orders were imperative. This court, however, declared that the constitutional provision referred only to a superior agent or officer, of the sort well known as such, or to some other person to whom was entrusted the direction or control of others for the accomplishment of some end dependent on his independent orders, born of the occasion, sprung from

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Brief for appellee.

him as director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employees, each charged with certain parts in the general performance. It was declared that the engineer and brakeman had reciprocal duties in enforcing the rules of the company for the successful operation of the train, and that superiority or right to control, in the sense of the constitution, could not be affirmed of them. It was said that the constitution did not intend to abrogate the rule of law applicable to fellow servants in a common employment, but to modify it, and that to hold that in the operation of a train the engineer was a superior officer of the brakeman, merely because it was the duty of the brakeman to obey his signals, would be to entirely sweep away the rule as to fellow servants.

In the case of *Farquhar* v. *Railway Company,* 78 Miss., 193, this interpretation of the constitution was expressly approved, and the court called attention in terms to the case of *Railway Company* v. *Hughes,* 49 Miss., 285, and said that it was not at liberty to overrule it, because the constitutional convention of 1890, with full knowledge of the doctrine of that case, in defining by section 193 of the constitution the rights between employees and railroad corporations, did not abrogate that doctrine.

Counsel for appellant will doubtless endeavor to take this case out of the rules of this court hitherto made because of certain rules and regulations of the appellee which, they will insist, made the engineer a superior agent or officer, or a person having the right to control or direct the services of the appellant. Before discussing these rules, we will observe that we are unable to make any distinction in our own minds between "a superior agent or officer" and "a person having the right to control or direct the services of the party injured." If one employee has the right to control or direct the services of another, he is a superior agent or officer within the meaning of the constitution. In saying this, however, we refer to a person

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Opinion of the court.

having such right of control as this court had in mind in making its utterance in *Evans* v. *Railway Company,* 70 Miss., 527. We think that small comfort will be derived by appellant from a consideration of the rules and regulations of the appellee.

Argued orally by *H. C. Peeples* and *James T. Harrison,* for appellant.

TERRAL, J., delivered the opinion of the court.

The constitution of the state of Mississippi (section 193) provides: "Every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured." The plaintiff was the fireman upon the locomotive operated by an engineer of the appellee company, running upon the Southern Railway, in the operation of said road, and alleges that by the negligent or wilful act of the engineer of his locomotive he was grievously injured; that the wrongful act causing his injury was that of his superior agent, the engineer, who, in disregard of his duty, within the limits of the city of Columbus, ran his engine at the rate of forty miles per hour, and hurled it against the engine of the house track, where the latter had a right to be, etc. The case made by the declaration is a wanton wrong on the part of the engineer, the superior agent of the fireman, by which the latter was injured for life. It comes within the direct provision of the constitution, and yet it is demurred to. "*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est,*" is a maxim of the common law. It is a rule for the interpretation of deeds, of acts of parliament, and other documents. According to this rule, it is not allowable to inter-

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Suggestion of error.

pret what has no need of interpretation, and the law will not make an exposition against the express words and intent of the parties or of the law-making body. Where there is manifest disagreement between the spirit and the letter of the law, the latter is made to yield to the real meaning as gathered from the whole instrument. But our constitution makers here made no mistake in the draft of section 193. There is no ambiguity of any sort that calls for construction. They have, we think, said what they intended, and they have meant, no doubt, what they have said. It is not our province to amend, repeal, or annul it. It makes its own interpretation. The plaintiff fireman was under the direction of the engineer. By the wrongful act of the latter he was injured. Section 193, constitution, gives him a remedy against the company.

Reversed and remanded.

SUGGESTION OF ERROR.

Catchings & Catchings, for appellee, after the delivery of the foregoing opinion, filed a lengthy suggestion of error reviewing the allegations of the declaration, and making the following points: "The question calls for a construction of a most important provision of our state constitution. Judge Terral, as we understand his opinion, holds that, as a matter of law, the engineer was a superior officer of the fireman. He also affirms that the fireman was under the direction of the engineer. No allusion is made by him to the rules of the company, although it was expressly agreed that the rules of the company should be considered as especially pleaded. In our brief we referred to a number of rules which are clearly pertinent, and, in our judgment, controlling, and, as Judge Terral refers to none of them, we assume that our brief was by some means mislaid, and not before the court at all. Judge Terral affirms there is absolutely no room for construction; that the constitution is so plain and unambiguous that it needs no interpretation. This does not accord with the view hitherto taken

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Suggestion of error.

by this court of this constitutional provision. In the case of *Richmond & Danville R. R. Co.* v. *Rush,* 71 Miss., 987; 15 South., 133, its meaning was considered so doubtful that Judge Campbell declined to hold that a conductor, within the meaning of the constitution, is a 'person having the right to control or direct the services of the brakeman.' He did carefully consider and interpret that provision of the constitution in the case of *Evans* v. *R. R. Co.,* 70 Miss., 529; 12 South., 581. In that case the plaintiff was a brakeman, who was injured by the negligence of the engineer, who had signaled for brakes, and, while they were being applied in pursuance of the signals, caused a movement of the train without proper warning. It was claimed by counsel for Evans that the engineer was the superior agent, or officer, or person, having the right to control or direct the services of the brakeman, for the reason that the engineer had the right to signal for brakes, and that when he did so he directed, as he had a right to do, the services of the brakeman in the matter of applying the brakes. This was the case as presented to the court, and upon this case Judge Campbell proceeded to interpret the constitution. He stated that it was not designed by the constitution to abrogate the rule of law applicable to the fellow servant in a common employment, but merely to modify it to the extent as indicated by section 193 of the constitution. He denied that the engineer was a superior agent or officer of the brakeman, or that he was a person having the right to control or direct his services, within the meaning of the constitution. He declared that the doctrine that one employee is the superior agent or officer or person having the right to control or direct the services of another employee contains no room for application when the two employees are engaged in the performance of the ordinary duties prescribed for them respectively by the rules of the company and the nature of the service. Judge Campbell then elaborated this view, and in language so perspicuous and virile that no man can add any strength to it. He divided the

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Suggestion of error.

section of the constitution into two parts; the first having reference to an injury resulting from the negligence of a superior agent or officer, and the second having reference to the negligence of a person having the right to control or direct the services of the party injured. As to the meaning of the expression 'superior agent or officer,' he said, 'The constitutional provision has reference to a superior agent or officer of the sort well known as such.' The superior agent or officer of the sort well known as such is one whose position, powers, and duties mark him out plainly as being a vice-principal, and it cannot be said that an engineer of a train, while discharging his ordinary duties, can be put in the position of a vice-principal. Judge Campbell thus defines what is meant by 'a person having a right to control or direct the services of the party injured': 'A person in the company's service, by whatever name, who may be entrusted with the right to control and direct the services of others according to his discretion and judgment; one to whom is committed the direction and control of others for the accomplishment of some end depending on his independent orders born of the occasion, sprung from him as a director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employees, each charged with certain parts in the general performance.' Judge Campbell continues: 'It may be that, under some circumstances, the engineer may be the superior of the brakeman in the meaning of the constitution, but in the operation of the train in accordance with the rules, one is no more superior than the other, and they are not within the rule established by the constitution.' Judge Campbell iterates and reiterates throughout his opinion that this provision of the constitution can never apply where both employees are engaged in the discharge of routine duties in pursuance of fixed rules established by the company for the general government of the various employees. We submit that this opinion, which contains no allusion to the opinion by Judge Campbell, is diametrically opposed to it, and over-

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Opinion of the court.

rules it. We respectfully submit that it abundantly appears from an inspection of the rules of the company that the engineer occupies no such relation to the fireman as that contemplated by the constitution." Counsel here quoted and commented upon a number of the rules of the company regarding the relations of the engineer and fireman, insisting that they are largely upon the same footing.

WHITFIELD, C. J., delivered the opinion of the court in respose to the suggestion of error.

The cause of action is stated in the very language of the constitution. How could a cause of action thus stated be demurred to? The opinion of Brother Terral correctly said, speaking of the declaration, "It comes within the direct provision of the constitution, and yet it is demurred to." The constitution provides not only that "a superior agent" is not a fellow servant of those over whom he is such superior agent, but it also expressly declares that "any person having the right to control or direct the services of the party injured" is not a fellow servant of such person. The question is, not what the rules of the company may provide, but whether the fact is, as shown by the proof, that the person suing was injured by the negligence of some other servant of the company who was either a "superior agent or officer," or, if not, was a "person having the right to control or direct the services" of the party injured. It is not a question whether the duties are what are called "routine" duties in the *Evans Case,* 70 Miss., 529; 12 South., 581. The question is simply and merely whether the person suing has been injured by the negligence of another servant having the "right to control or direct his services," whether that right to so control and direct springs from any rules of the company or from the course of business as shown by the testimony. Now, this declaration distinctly avers the cause of action to be that the appellant was injured by the negligence, wilful and wanton, of the engineer, who is averred

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to have had "the right to control and direct his services." The demurrer admitting this, must, of course, be overruled. The case should be developed on its facts, and, if the testimony shall show that the engineer did not have the "right to direct and control the services of the fireman," the defendant can seek the benefit arising from such testimony by proper instructions. Counsel himself concedes that circumstances may arise under which an engineer would have such right. This admission shows that the action of this court in overruling the demurrer was proper, since the declaration stated the identical cause of action the constitution declares shall be good. Whether one servant is under the control or direction of another servant is not to be determined by the rules of the company. It is to be determined always by the facts in the case and the nature of the act performed. The facts surrounding the act itself, and the actual relation of the two servants to the act, these facts are the only proper tests of whether one servant is under the control or direction of another. If the mere paper rules are to determine this question, then they would settle the matter in those cases even where the facts plainly show that the servant suing was clearly under the control and direction of the servant whose negligence caused the injury. The rules of the company are, of course, competent evidence, but they are simply evidence at last; and whenever the facts in any given case show that, notwithstanding the rules, what occurred in the particular case demonstrates the one servant to have been injured by the negligence of another servant, who had the right to control and direct his services, the facts, and not rules, must govern. But it is said that the rules here were agreed to be treated as part of the declaration. If this be granted, we find nothing in the rules to aid appellant. On the contrary, on page 112 of the rules of the railroad company (rule No. 574) we find the following: "When with the engine, they [meaning the firemen] must obey the orders of the engineman." This shows clearly that, even according to the rules,

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Statement of the case.

the fireman when with the engine is not a fellow servant of the engineer. We wish to add that the very able and learned brief of counsel for appellant was not overlooked on the first hearing of this case. It was read and re-read, and all the authorities examined. The case was considered for some months, and the deliberate conclusion reached is, in our judgment, clearly correct.

Suggestions of error overruled.

MAX WEINER v. WILLIAM T. DICKERSON ET AL.

1. TAX SALES. *Laws* 1890, *p.* 16, *ch.* 5. *List of state lands. Evidence.*

An unsigned, unsealed, uncertified and unfiled writing, without proof of its origin or history, is insufficient to prove a sale of lands for taxes under laws 1890, p. 16, ch. 5, providing that the auditor should prepare a correct list of state tax lands in each county and forward the same to the chancery clerk who should record the same and furnish a copy, certified under the seal of his office, to the sheriff and tax collector and empowering the tax collector with such copy to sell the lands, although the writing was properly captioned for the list to be furnished by the auditor under said statute and contained the lands in controversy.

2. SAME. *Recitals in deed.*

The recitals of a sheriff's and tax collector's deed, made under said statute, are insufficient to prove the jurisdictional facts authorizing a sale thereunder.

FROM the chancery court of Quitman county.

HON. A. MC. KIMBROUGH, Chancellor.

Weiner, appellant, was complainant in the court below; Dickerson and others, appellees, were defendants there. From a decree in defendant's favor the complainant appealed to the supreme court. The opinion states the case.

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Brief for appellant.

St. John Waddell, for appellant.

The court's attention is called to a careful examination in the record of what purports to be a list of the lands held by the state and furnished the chancery court clerk under the act of 1890 for the sale by the tax collector under that act, and it will be seen that said list is not authenticated in any way. There is no certificate of any officer whatever on it. There is not even the name of any official to it, and it is not even marked filed by the chancery court clerk, and, so far as appears from said list, it is nothing more than some loose papers, possessing no official signification whatever or indication of when compiled or received.

It clearly appears from the act of 1890 that a plan was adopted by the state by which a new and perfect tax title could be acquired to all tax lands it then held, regardless of any defect which then existed in its existing title to the same. To carry out this plan, the auditor was required to furnish a complete and perfect list to each county, of all tax lands appearing on the state's books in the county, and on receipt of this list the chancery clerk, sheriff and president of the board of supervisors were to go carefully over the same and make all necessary corrections thereon and eliminate therefrom the same, so as to make it conform to the records of the county, and when all this was done the clerk was required to record the completed list and furnish the sheriff a copy thereof under his seal of office, by which to make sale of the lands described thereon, and the sheriff was required to make return to the auditor of all his actions thereunder.

It was the completed list issued to the sheriff by the chancery clerk under his seal of office that constituted the sheriff's authority to make sale of the lands. The law did not authorize the sheriff to sell any lands except those appearing on the completed list, duly recorded and certified to him under the seal of the office of the chancery court clerk, and this list was in its nature an execution requiring the sheriff to sell the lands

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Brief for appellee.

thereon described and make full return of all his actions thereunder to the auditor of public accounts.

Nothing of this kind appears to have been done in Quitman county. If the court presumes that the list in this case was furnished by the auditor, there is nothing to show that it is a correct list, or when it was received by the chancery clerk, or whether ever received by him or not, and there is nothing in this record to show that the clerk, sheriff or president of the board of supervisors ever revised or corrected said list, and it is certainly not the list furnished the sheriff under which to sell the lands, because it has neither the name of the chancery court clerk on the same or his seal of office.

I. T. Lowe, for appellee.

The only question raised, really, on this appeal, is the want of a certificate to the list sent by the auditor to the chancery clerk of Quitman county, of the lands held by the state, the said list being sent as required by the said acts of 1890, page 16. And we insist that the statute required no certificate, in fact, only required a list or memoranda of lands held by the state for taxes, giving proper description, date of sales to the state, amounts sold for, and all taxes, damages and costs that have accrued since said sale up to August 10, 1890, and then that said list be forwarded by the auditor to the chancery clerk of the county where the lands were situated, not one word is mentioned in said act about a certificate to said lists or otherwise. Acts 1890, page 16.

In this case we insist that the corrections required by law were made, as the presumption is that those things were done, that under the law ought to have been done. The law presumes that the sheriff and tax collector performed his duty, when there is no proof to the contrary. And, further, we see from the deed executed by Jones, sheriff and tax collector, to Dickerson, that the lands were sold on the proper day, and the very wording of the statute is incorporated in the deed.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

This controversy is over the title to lot 4, section 10, township 29, range 2 west, in Quitman county. Other lands are embraced in the bill, but the decree in chancery below is apealed from only in so far as it affects this particular lot 4 in section 10.

The claim of Weiner, the complainant in the proceeding, is clearly just, and not disputed, unless the defandant had a good title by purchase at sheriff's sale pursuant to chapter 5, page 16, acts 1890. That act provides that the auditor should prepare a correct list of state tax land in every county, which list should embrace the date of sale, amount for which sold, with taxes, damages and costs accruing to August 1, 1890, which list the auditor should forward to the chancery clerk, who should record it in a separate book. The act further provided that the chancery clerk, on receipt of the list, and before recording it, should notify the sheriff and president of the board of supervisors of the receipt of the list, whereupon the three should meet to compare and correct it, upon which being done, the clerk should at once record the list in that separate book, and at once furnish the sheriff a copy of it under the seal of his office, and that the sheriff, on receiving the list from the clerk, should advertise and sell the land. Section 4 of the act provides that the deed of the sheriff, pursuant to such sale, shall convey absolutely all title to the state, or parties claiming under or through her, to said lands; and section 6 provides that such sales shall vest and convey absolute title to said lands, which could not be impeached "on account of any irregularity in former sales, or on account of any vague or indefinite description or informality or illegality of assessment, or for any other reason whatsoever that may have existed prior to said sale herein provided for."

In the progress of the trial the defendants offered in evidence a piece of paper headed: "List of lands now held by the state now forfeited for taxes in Quitman county, Mississippi,

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Opinion of the court.

furnished the chancery clerk of said county by the auditor under the provisions of an act entitled, 'An act to facilitate the sale of lands held by the state for taxes, correct erroneous sales and assessments, and indefinite descriptions, and for other purposes. Approved February 22d, 1890.' "

Under this there is a statement of the various taxes, and funds and fees, with dates of sale to the state, describing all lands and number of acres, but there is no indication anywhere of the person making this list, or showing that it ever was in the auditor's office, and it is not signed by anybody, and has no certificate whatever attached to it. There is no indication whatever that it was ever filed or marked filed by the chancery clerk. There is no showing that the chancery clerk ever recorded it, or ever furnished the sheriff a copy of it under his seal of office. As to its constituting any part of any record, it appears to be no more, on the face of the papers, than if it had been blown into the record by a breeze.

The complainant objected to the list and the sheriff's deed, and we cannot concur with the learned chancellor in the view that the evidence showed any power in that officer to sell. If it be conceded that the list need not be certified to by the auditor because the act does not specifically require it, even in that case, it would seem, there should appear some showing that it, in fact, did come from the auditor, and, if this be not true, certainly the sheriff should be armed with a copy of it from the chancery clerk "under the seal of his office," as required by section 2 of the act, before he can validly sell. The recitals of a sheriff's deed cannot supply statutory power.

Reversed, and decree here confirming appellant's title to lot 4 *in section* 10, *township* 29, *range* 2 *west, in Quitman county.*

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Against the motion.

SAMUEL LEVY v. THOMAS J. ROSSEL ET AL.

[Motion.]

CHANCERY. *Receiver. Interlocutory decree. Appeal. Code* 1892, § 34.

A defendant from whom property is taken and placed in the hands of a receiver by an interlocutory decree, notwithstanding his claim that it is exempt from liability to his creditors (code 1892, § 1971) is entitled to an appeal from the decree, under code 1892, § 34, providing for appeals from interlocutory orders whereby the possession of property is changed.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Rossel and another, appellees, were complainants in the court below, Levy, appellant, and others were defendants there. When the case reached the supreme court on Levy's appeal, appellees moved the court to dismiss the same. The facts relating to the motion are fully stated in the opinion of the court overruling the motion.

Ford & White and *Dodds & Griffith,* for the motion.

The appeal in this case is not warranted by code 1892, section 34. The general rule is that appeals only lie from final decrees. The present appeal, not being authorized by statute, should be dismissed. *Hanon* v. *Weil,* 69 Miss., 477; *Pearson* v. *Kendrick,* 74 Miss., 240; *High* v. *Receivers,* sec. 25; *Beach* v. *Receivers,* sec. 40.

Harper & Harper, against the motion.

The petitioner for the appeal brings himself clearly within § 34, code 1892, as the decree required money to be paid and the possession of property to be changed, and, further, the appeal was applied for within ten days after the date of the decree

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Opinion of the court.

complained of and an appeal bond, with two good and sufficient sureties, was tendered with the application; we are clearly within both of said sections of the code in which an appeal is expressly given as of right and not as a matter of discretion. *Vause* v. *Woods,* 46 Miss., 120; *Hill* v. *Robertson,* 23 Miss., 306; *Simmons* v. *Henderson et al.,* Freeman's Chancery Reports, p. 500.

TERRAL, J., deivered the opinion of the court on the motion.

The creditors of Levy & Bellande—the latter being dramshop keepers in Biloxi—filed their petition in the chancery court of Harrison county to have a receiver appointed to take charge of the moneys and effects of Levy & Bellande, and to administer them for the benefit of the petitioners. No objection was made by Levy & Bellande to the appointment of a receiver, but Levy alleged that he was a householder and the head of a family, residing in the city of Biloxi, and that he was entitled to and claimed an exemption of $250 in said assets of Levy & Bellande. The court, without noticing Levy's claim of exemption, made an order placing the moneys and other assets of Levy & Bellande in the hands of a receiver, from which order Levy asked an appeal to the supreme court, which the chancellor refused. Levy then applied to a justice of this court for an appeal, and the same was granted to him. The motion here is to dismiss the appeal.

We think Levy entitled to an appeal. His property—the moneys and assets of Levy & Bellande—was taken out of his hands and put into the hands of a receiver, and against his assent, as to the exemption claimed by him. If he is the head of a family and a householder in Biloxi, he is entitled to his exemption, and it should not be taken from him and put into the hands of a receiver.

The appeal is clearly maintainable, under section 34, *code* 1892, *and the motion to dismiss the same is overruled.*

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Brief for appellant.

JAMES W. BENNETT v. MELISSA MAXWELL.

TAX TITLES. *Assessment roll. Time for filing extended. Auditor of public accounts. Code* 1892, § 3784.

The auditor of public accounts has no power to extend the time for filing an assessment roll; this can be done only by the board of supervisors, under code 1892, § 3784, empowering the board in the premises.

FROM the chancery court of Lincoln county.

HON. HENRY C. CONN, Chancellor.

Mrs. Maxwell, appellee, was complainant in the court below; Bennett, appellant, was defendant there. From a decree in complainant's favor defendant appealed to the supreme court.

The bill was to cancel defendant's tax title as a cloud upon title to land. The land was sold on the first Monday in March, 1893, for the taxes of 1892, by the tax collector. The evidence in the case showed that the assessment roll, of which the tax sale was predicated, was not returned by the assessor on the first Monday of July, 1892, as required by law, code 1892, § 3782, but the auditor of the public accounts assumed to extend the time for filing and returning it until the first Monday in August, 1892.

A. C. McNair, for appellant.

The minutes of the board of supervisors, together with the other records of the chancery clerk's office, were destroyed by fire on November 6, 1893, and there is no evidence as to when the assessment roll of 1892 was delivered to the clerk of the board of supervisors, except the assessor's affidavit attached to the roll, made the first Monday of August, 1892. The fact that the roll was not completed and delivered to the clerk on the first Monday of July did not invalidate the assessment. It

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Brief for appellee.

was approved by the board by operation of law, such is the express provision of § 3783, code 1892. There is no evidence to show that the board did not, on the first Monday of September, 1892, approve the roll. There is nothing to show that objections were not filed to the assessment, and that the roll was not approved by operation of law. It affirmatively appears from the evidence that the tax collector executed a deed to the land to Bennett, and that it was burned, with the other records in the court house. This deed of conveyance is *prima facie* evidence that the assessment and sale of this land were legal and valid. Sec. 1806, code 1892.

This case is vastly different from *McGuire* v. *Union Investment Co.*, 76 Miss., 868. There the assessor did not file the roll either on the first Monday of July or on the first Monday of August, but on the 17th day of August, a day on which in no event was he authorized by law to file the roll. In the *McGuire Case*, this court says: "There is a vast difference between a failure to return an assessment roll on the very day named for its return, followed by compliance on the board's part with all the other requirements of the law, and a failure to return for two months, and an approval without an opportunity to taxpayers to make objections, on the very day fixed by the board's order for its return." The record in that case was not destroyed, and the party contesting the tax sale was able to disclose to the court the entire action of the board with reference to the roll, while here the record is undisclosed and the tax collector's conveyance is *prima facie* evidence of the validity of the assessment and sale. Appellee had not overturned the *prima facie* character of the tax conveyance. *Herndon* v. *Mayfield*, 79 Miss.. 533.

P. Z. Jones, for appellee.

The plan of the law is that the assessment of persons and property must be made between the first of February and July of each year; that the roll or rolls must be completed and re-

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Opinion of the court.

turned by the assessor on or before the first Monday of July; but, to provide for contingencies, the law declares that for cause shown, it appearing that the assessor is capable, the board may extend the time for returning the roll until the first Monday of August. However, the roll must be returned and filed on the first Monday of July, unless the board of supervisors adjudge (*a*) that good cause exists for the failure, and (*b*) that the assessor is capable of completing it by the first Monday of August. Code 1892, § 3771, 3782 *et seq.*

The right to file the roll at any other time other than the first Monday of July depends upon the will and consent of the board of supervisors, which must be evidenced by order placed on the minutes. *McGuire* v. *Union Investment Co.*, 76 Miss., 868; *Herndon* v. *Mayfield*, 79 Miss., 533.

It having been shown that the roll was not filed on the day named for its return, the burden was on appelants to show clearly that the roll was approved either by the board of supervisors or by operation of law, and he did not meet this burden.

CALHOON, J., delivered the opinion of the court.

We notice but one objection to the claim of tax title shown by this record, because that is decisive. It affirmatively appears here that the assessment roll was not filed on the first Monday of July, as it should have been, and that the extension of time to the first Monday in August, when it was filed, was granted by the auditor, who was without power to grant it. The board of supervisors only can extend the time.

Affirmed.

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Brief for appellant.

FRANK GAMBLIN v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Evidence. Conservator of the peace. Transcript of testimony. Code* 1892, § 1463.

It is error on the trial of an indictment to permit the introduction by the state of several pages of the testimony before a conservator of the peace, taken and reduced to writing on a preliminary trial of the accused, when uncertified and no account is given of the missing pages.

FROM the circuit court of Neshoba county.

HON. GUION Q. HALL, Judge.

Gamblin, appellant, was indicted and tried for murder, was convicted of manslaughter, and appealed to the supreme court.

The facts upon which the case turned in the supreme court are sufficiently stated in the opinion of the court.

Jones & Hughston, for appellant.

This writing should not have been admitted in evidence.

In the first place, it was not proven to be the substance of the evidence of said witness as taken down by the court or under his direction. The justice of the peace, who held the preliminary examination, testified that he did not take down the testimony in said examination, but that others did under his direction, but that he was not willing to state on his oath that this was the evidence taken, but that he thought it was; that the witness signed the written statement then and there, and then made and took the same to the grand jury at its next meeting. This paper did not contain the witness' signature, nor the magistrate's certificate, and without positive proof that this was the identical paper and writing made in said examination, the same should have been excluded from the jury, and the court erred in admitting it without such positive proof.

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Opinion of the court.

In the next place, the proof shows conclusively that said writing does not contain the substance of the entire testimony of said witness. The justice of the peace stated that he thought that there were two pages of the cross-examination missing.

The defendant was entitled to the substance of the entire evidence of said witness, or the whole should have been excluded. 1 Greenleaf on Evidence, sec. 165.

Monroe McClurg, attorney general, for appellee.

Argued orally by *E. V. Hughston,* for appellant, and by *Monroe McClurg,* attorney general, for appellee.

TERRAL, J., delivered the opinion of the court.

Upon the trial of Gamblin in the circuit court of Neshoba county, what purported to be evidence of Roland Edwards was offered by the state to be laid before the jury. This purported evidence consisted of twelve pages of written matter, uncertified to by an officer. Before reading it to the jury, reason, not to say law, seems to have called for some explanation. Therefore, the committing magistrate, J. C. Harrison, being sworn, stated that he had caused the testimony of Roland Edwards to be taken down in writing, but failed to state that he duly certified to it. He was asked whether he could give the substance of the testimony of Roland Edwards, to which he replied that he could not; that the witness was on the stand for one and a half days; and that what he thought was material was taken down in writing, upon fourteen pages of writing, of which twelve of the pages, he thought, were before them, but two of them were missing; that he could not say what was in the missing pages. The twelve pages were read to the jury as the evidence of Roland Edwards.

We think it was inadmissible. There is no pretense that the examining magistrate, Harrison, certified to it, and that destroyed the validity of the instrument as a means of evidence.

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Statement of the case.

Harrison denied that he could give the substance of the evidence of Roland Edwards, and no other person pretended any ability of that sort. The twelve pages of evidence purporting to be the evidence of Roland Edwards were not admissible in evidence.

Other errors are alleged, but the evidence does not support the contention in respect to them.

Reversed and remanded.

LICURGUS C. QUIN v. STATE OF MISSISSIPPI.

CONSTITUTIONAL LAW. *Statutes. Questioning validity. Estoppel. Laws 1900, chapter 105. Seizure of intoxicating liquors.*

Where intoxicating liquors were seized, under laws 1900, chapter 105, providing therefor, and a party claim the same in pursuance of the provisions of said statute, he is not in position to insist that the statute is unconstitutional because it does not provide for notice.

FROM the circuit court of Pike county.

HON. JAMES B. STERNBERGER, Special Judge.

The state, appelee, caused a quantity of intoxicating liquors to be seized under the provisions of the laws of 1900 (chap. 105, p. 142), which provides therefor, on the affidavit before a justice of the peace, of any creditable person that he has reason to believe, and does believe, that such liquors are being kept and offered for sale or . . . sold in violation of law in any room or building designated in the affidavit. The statute requires the issuance of a search warrant and writ of seizure, but does not require notice to any one. It, however, provides that any person may, by affidavit, claim the liquor seized, and thereupon an issue is to be made up to try the claim. If no one claim the liquors, they are to be destroyed. In this case

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Opinion of the court.

appellant, Quin, claimed certain liquors seized under the act, and his claim having been decided against him in the circuit court, he appealed to the supreme court.

R. N. Miller, for appellant.

[Counsel filed an able argument, insisting that the act of 1900, chapter 105, was and is unconstitutional, in that it deprived of property without due process of law, without notice, etc. Since the court did not pass upon the question, a synopsis of the argument is not given.]

J. N. Flowers, assistant attorney general, for appellee.

[The argument of the assistant attorney general was also limited to the constitutionality of the statute, and, therefore, a synopsis of it is not given.]

WHITFIELD, C. J., delivered the opinion of the court.

Whether chapter 105 of the acts of 1900 is constitutional or not—and we are inclined to think it is, although not now deciding that point—this appellant is in no condition to question it on the ground on which he puts his assault. His own contention is that the act is unconstitutional because not providing for notice, and yet the appellant appeared, and has contested the case through all the courts. The only purpose notice would serve has been acomplished in his case, and courts do not pass upon the constitutionality of statutes at the instance of parties not in a position to question them.

Affirmed.

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Brief for appellant.

ILLINOIS CENTRAL RAILROAD COMPANY v. FRANK DENHAM ET AL.

RAILROADS. *Plantation roads. Crossings. Code* 1892, § 3561.

A railroad company which leaves a train of cars standing upon a plantation road-crossing for six consecutive days, so as to deprive the owner of its use continuously during that time is liable under code 1892, § 3561, providing that every railroad shall make and maintain convenient and suitable crossings over its track for necessary plantation roads and giving a penalty for failure to do so.

FROM the circuit court of, first district, Hinds county.

HON. ROBERT POWELL, Judge.

Denham and another, appellees, were paintiffs in the court below; the railroad company, appellant, was defendant there. From a judgment in favor of plaintiffs the defendant appealed to the supreme court, assigning as error the over-ruling of a demurrer to plaintiff's declaration.

Mayes & Harris, for appellant.

While we may concede that there might be such a permanent obstruction of a crossing by the railroad company as to amount to its utter destruction, and a violation of the statute, we insist that there must be a manifest intention on the part of the railroad company to cease to maintain the crossing. The mere temporary obstruction by placing a train of cars across the crossing, while it may, in a proper case, entitle the party to recover damages, yet it is not, and cannot be tortured into a failure to maintain the crossing within the meaning of the statute, so as to subject the railroad company to a penalty of $250.00.

If a railroad company temporarily obstructs the crossing with its train needlessly or negligently, and the landowner is dam-

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Brief for appellees.

aged, he has his right of action. But certainly he is not entitled to recover a penalty simply because he may be temporarily inconvenienced, the crossing being in every other respect what the law requires, convenient and suitable.

Penal statutes are strictly construed. All that the railroad company was required to do was to construct and maintain suitable and convenient crossings, and it is a failure to do this, for which it is liable to a penalty.

If a railroad company has constructed and has kept up, as the declaration shows, through all this time a suitable and convenient crossing, it has complied with the statute, and the mere fact that it temporarily obstructed the crossing with its train would not entitle the plaintiff to the penalty, while he might have an action for damages if he suffered from it. There is no reason for inflicting the railroad company with a penalty in this case, because the legislature has not provided one for the obstruction of a farm crossing, as it has for a public highway.

In *Railway Company* v. *Jones,* 73 Miss., 397, the court held the statute must be strictly construed, and the court has adhered to this rule of imposing upon this highly penal statute the most rigid construction.

If the court should hold that the judgment of the court below in this case is correct, then any temporary obstruction of a crossing by a train which subjected the landowner to temporary inconvenience would subject the railroad company to a penalty of $250—more than twice as much as is imposed upon the railroad company for obstructing public highways.

Harper & Potter, for appellees.

We do not deny that the statute is penal or the general rule that such statutes should receive a strict construction, but we do deny that by invoking this general rule, the purpose and effect of the statute can be destroyed or impaired. *Board of Education* v. *Railway Co.*, 72 Miss., 236.

To carry out the purpose and effect of the statute, our court

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Brief for appellees.

has held that the word "necessary" as used in the statute, meant "reasonably convenient" and that the statute alluded to pasture lands as well as agricultural. *Alabama, etc. R'y Co.* v. *Odeneal,* 73 Miss., 34.

Two or more plantation roads may be reasonably necessary upon the same place. *Railway Co.* v. *Odeneal, supra; Railway Co.* v. *Ligon,* 74 Miss., 176.

Our court also denied a construction claimed by the railroad, that would impair the purpose and use of the act in holding that tenants were included in the words "persons interested" and might maintain the action after the lease expired. *Railway Co.* v. *Ligon, supra.* That a place containing four acres was entitled to a "plantation road," and that a place need not be enclosed to give the right to have a crossing. *Hardy* v. *Railway Co.,* 73 Miss., 719.

The appellant contends that leaving a train of cars stretched over a crossing for a great length of time, and wholly destroying its use, is not a failure to maintain, within the meaning of the statute.

The word "maintain," acording to Webster, means "To hold or keep in any particular state or condition. Not to suffer to cease or fail."

As defined by the Century Dictionary, it means "To hold in an existing state or condition, to keep in existence or continuance, to preserve from lapse, decline, failure or cessation. Keeping up." And as defined by the Standard, it means, "To hold or preserve in any particular state or condition; keep free from failing, declining or ceasing."

The statute intended that the road shall be kept in an open, passable condition, that will give the farmer free access to his crops, so that they may be tilled, gathered and marketed, or as stated by our court in the Odeneal case, "The plain object of the act was to compel railroad companies to give the owners of farms a convenient mode of access from one part to the other, when divided by a railroad," and this condition the railroad must

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Opinion of the court.

"continue, not suffer to cease or fail" except as the necessity of the situation may require.

Counsel for appellant argue that if the appellees sustained damages, that they had an action at law, but the court will see that the gravamen of such an action would of necessity be the failure of the railroad to maintain the crossing.

Argued orally by *J. B. Harris,* for appellant, and by *W. H. Potter,* for appellee.

CALHOON, J., delivered the opinion of the court.

Section 3561 of the code (1892) deals with private rights, and its purpose was to secure to the landholder of inclosed land easy access to his property on each side of the railroad. In order to effectuate this purpose it requires every railroad corporation "to make and maintain convenient and suitable crossings over its track for necessary plantation roads." To insure compliance with this law, so necessary to individuals in this agricultural state, it further provides that, "for any failure so to do, the railroad company shall be liable to pay $250, to be recovered by the person interested."

The declaration here charges that the railroad company made the crossing and maintained it for several years, but that, for six consecutive days at one time continuously, it left a train over it, wholly depriving plaintiffs of its use, and hindered, delayed, and injured them, that crossing being the only way of egress they had from their residence and for the transaction of their business, and that, for the six days, the company "wholly neglected and refused to maintain said crossing," and, the instrument concludes, "to plaintiff's damage $250," etc.

It is contended for the company that the meaning of the statute is that the railroad companies should construct the crossings at their own expense, and maintain them at their own expense, and had no reference to temporary obstructions they might willfully put on them, though it is conceded that this law

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Statement of the case.

would apply to a case where there is an intention by the railroad company to permanently obstruct the crossing. This would bring up the question as to what should be considered such a permanent obstruction as would be equivalent to a violation of the duty to maintain. It would seem that a deliberate and willful obstruction for six days continuously would be as much a violation of the duty to maintain as would be an obstruction for six weeks or six months. We think the word "maintain" in the statute should not be restricted to such narrow sense. The object was to maintain the crossing for use, and the question is not merely whether the crossing was kept in good order. In however perfect condition it might be kept, the statute would have no force, and be of no benefit whatever, if the use for which it was designed be not maintained by the company so far as it is concerned. We think there was no error in overruling the demurrer to the declaration. If a case should be made on the facts showing that the obstruction was unavoidable or necessary, there would be a different question before us.

Affirmed.

BANK OF FOREST ET AL. v. ORGILL BROS. & CO.

CORPORATIONS. *Promoters. Contracts. When corporation not liable.*

A corporation is not liable on contracts made by its promoters unless it adopts the same or receives their benefits.

FROM the circuit court of Copiah county.

HON. ROBERT POWELL, Judge.

Orgill Bros. & Co., a corporation, appellee, was plaintiff in the court below; the Bank of Forest, and one Huber, were defendants there. From a judgment in plaintiff's favor both defendants appealed to the supreme court.

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Brief for appellee.

Huber and others were organizing a corporation, the Bank of Forest. At a meeting of the promoters and subsequent incorporators, before the corporation came into being, Huber was authorized by them to purchase a burglar-proof safe, vault door, etc., for the use of the bank, after which he ordered the safe, vault door, etc., from Orgill Bros. & Co., and signed his own name to the contract of purchase. A short time after this Huber undertook to countermand this order, and Orgill Bros. & Co. refused to allow him to do so, and the bank afterwards ratified, not Huber's contract, but his action in countermanding the order, and refused to pay for the property ordered.

Kirkland & Bullard, for appellant, Bank of Forest.

The Bank of Forest is not bound, because it was never a party to the contract. The contract was signed by Huber about thirty days before the Bank of Forest was chartered, organized, or had any legal or actual existence. The bank could not assent or become bound before it was in existence. This needs no argument or citation of authority. Before the Bank of Forest was ever chartered or organized, assent to the order was withdrawn by Huber, and from that time until today every movement made by the bank has been a repudiation of it. It was expressly countermanded by Huber, both for himself and for the bank. The bank never ratified it, never assented to it, never received any benefit by or under it, never in any manner acquiesced in it, and, in fact, Huber informed appellees that neither he nor the Bank of Forest would receive or pay for the property. Whoever else may be liable, it is clear that the bank is not.

R. P. Willing, Jr., and *Green & Green,* for appellant, Huber.

Mayes & Harris, for appellee.

Since Huber had no right to countermand the order, his liability is clear. The contract rights of the parties were fixed. The whole law on the subject is so fully set forth in Benja-

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min on Sales (6th ed.), 745, American Notes, that it hardly seems necessary to give any further references. But there are plenty of others. See 5 Lawson's Rights and Remedies, sec. 2623; *Hoy* v. *Grenoble,* 34 Pa. St., 9; *Simmons* v. *Brown,* 5 R. I., 299; *Express Co.* v. *Egbert,* 36 Pa. St., 360; *Field* v. *U. S.,* 16 Court of Claims, 434; *Steel Co.* v. *Hinckley,* 17 Fed. Rep., 584; *Goodrich* v. *Hubbard,* 51 Mich., 63; *Wisner* v. *Barber,* 10 Oregon, 343; *Fairchild* v. *Rogers,* 32 Minn., 269; *Donnell* v. *Jones,* 17 Ala., 689; *Hitchcock* v. *Galveston,* 3 Wood, 287; *Wolcott* v. *Mount,* 36 N. J. L., 262; *Wakeman* v. *Machine Co.,* 101 N. Y., 205; *Boom Co.* v. *Prince,* 34 Minn., 71; *U. S.* v. *Behan,* 110 U. S., 338; *Boyd* v. *Meighan,* 48 N. J. L., 404; *Bank Note Co.* v. *Commissioners,* 79 Va., 563.

The Bank of Forest is liable because, as a matter of fact, the record in this case shows a ratification after the bank's organization was complete.

Huber admits that an order was passed by the bank, after its organization, by which his attempted cancellation of the contract was approved. The very fact that the bank acted, approving Huber's attempted cancellation of the order, was a recognition of the fact that his action was for and on behalf of the bank.

TERRAL, J., delivered the opinion of the court.

The judgment appealed from must be reversed as to the Bank of Forest. The contract of Huber, one of the promoters of the Bank of Forest, for the purchase of a burglar-proof safe and a vault door from appellees, was before the incorporation of the Bank of Forest; and it is a rule of law that such contracts of promoters are not binding upon the corporation unless it receives the benefit thereof, or the contract is adopted by it. There has been no acceptance or adoption here. Morawetz on Corporations, sec. 548; Law of Promoters, etc., by Alger, c. 10, § 203.

Affirmed as to Huber; reversed as to the Bank of Forest.

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Statement of the case.

JOHN BAKER v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Rape. Evidence. Reputation for chastity.*

In a prosecution for rape it is error to permit the state to show:

(*a*) That prosecutrix was a chaste woman, her general reputation in that regard not having been assailed by defendant;

(*b*) That defendant ill treated members of his household, where such evidence does not tend to explain delay in the prosecution;

(*c*) That a witness not called by the defense had been told by defendant that she would have to swear lies to help him out; and

(*d*) That witness had heard noises indicating distress at defendant's house, they not knowing what made the noises or why they were made.

2. SAME. *Delay in prosecution.*

Long delay in prosecuting for rape demands a close scrutiny of the testimony before conviction.

FROM the circuit court of, first district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Appellant, Baker, was indicted for committing a rape upon one Adeline Baker, his stepdaughter, was convicted and appealed to the supreme court.

On the trial, Adeline, the prosecutrix, testified that she was the stepdaughter of appellant, and was the mother of three children by him, the oldest being seven years old; that, about eight or nine years before, she had intercourse with appellant in the woods; that he was squirrel hunting, and proposed to have intercourse with her, which she refused; that he thereupon whipped her with a whipstock, until she submitted through fear; that she told her mother that night, and defendant whipped her for it the next day. She further testified, over objection, to the cruel and inhuman treatment of her by de-

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Brief for appellant.

fendant, covering a period of more than seven years; that defendant beat and mistreated other of his children, and also mistreated and abused her mother, and on one occasion assaulted her with a gun, and drove her from her home during the night. Sallie Ann Baker testified, over defandant's objection, that defendant had told her to testify, if she was introduced, that she had seen Ransom Evans hug and kiss Adeline, which was not true, and that he told her she would have to swear to some lies to help him out. Some other testimony was introduced by the state as to defendant's treatment of members of his family other than the mother and Adeline. Noland and Saxon testified for the state, over defendant's objection, that each lived one year near defendant, and at different times heard noises at or near defendant's house which indicated distress.

Harris & Scott, for appellant.

The court below erred in permitting the prosecutrix to testify to the ill treatment of her by the appellant without showing some connection between said ill treatment and the alleged rape, *Raines* v. *State,* 33 So. Rep., 19. We cannot see its relevancy or how it tends in any way to prove any point in issue. *Railroad Co.* v. *Tyson,* 46 Miss., 729.

The court below erred in allowing the district attorney to ask the prosecutrix questions as to her association, and her opportunities to have sexual intercourse, with other men. This evidence could not possibly be competent for any purpose except to bolster up the general reputation of the prosecutrix for chastity, while her reputation was not in issue at any time during the trial, for the defendant did not in any way attack it at any time during the trial.

The court below erred in permitting the witness, Sallie Ann Baker, to testify to what she said the defendant told her to say, for the defendant had not introduced her as a witness, and the evidence was only competent, for the purpose of discrediting her testimony had she been introduced as a witness for the defense.

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Brief for appellee.

The court below erred in permitting the witness, Emma Baker, to testify as to the defandant's ill treatment of her, for it does not in any way prove or tend to prove that the defendant raped her sister, and served no purpose in the trial except to add to the prejudice already created in the minds of the jury against the defendant by the testimony of the prosecutrix.

The court below erred in permitting the witnesses, Noland and Saxon, to testify as to the noises they said they heard at or near the house of the defendant, for it is not shown that the defendant caused these noises, and, if he had, the evidence does not have any probative value, for the testimony itself shows that the noises occurred several years after the alleged rape.

The court below also erred in permitting the above named witnesses to testify as to the defendant's treatment of his family, for the treatment of his family was not in issue, and the testimony had no probative value in the determination of the issue being tried.

William Williams, attorney general, for appellee.

If the testimony is to believed, the verdict is proper, and should stand. In cases of this kind a verdict of guilt may be predicated of the unsupported testimony of the prosecutrix. 2 Bish. New Crim. Proc., 969; *Monroe* v. *State,* 71 Miss., 196.

It was material for the state to show that the prosecutrix made complaint of the injury while it was recent (1 Whar. Crim. Ev., 9th ed., 273), but it is not required that a judicial investigation shall immediately follow the commission of the crime to fix guilt upon the perpetrator. Proof was made that the prosecutrix made complaint to her mother while the injury was yet recent, and prosecutrix testified that appellant threatened to kill her if she made public the commission of his crime upon her person.

Proof of the conduct of appellant after the commission of his crime, which conduct was such as to terrorize those pos-

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sessing knowledge of the crime, and thus prevent its being revealed, was no surprise (such surprise as the law holds objectionable), and no prejudice to appellant, and no confusion of issues, as insisted by counsel for appellant, but was an explanation by the state why the unfortunate victim and other members of the family, knowing of the crime, had at last, perchance, been enabled to throw off the yoke of slavery to appellant's threats, intimidation and brutality, intercept his deliberate scheme of remorseless and calculating villainy, and aid the court by disclosing the facts to ascertain the punishment deserved.

Raines v. *State,* cited by counsel for appellant, fails to support the contention here that the testimony last above mentioned is incompetent. Raines was on trial for the murder of his wife. Several distinct offenses were proved against the defendant, as well as the repeated cursings and continuous ill treatment of his wife, extending back before the killing, to a period of ten years. The court held "that it is only where the previous crime is connected with the one for which the defendant is on trial, and where it sheds light upon the motive of the accused, that it can be proved against him, unless it form a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts."

In the case under consideration the motive of appellant is clear, in all the various and merciless cruelties to prosecutrix and the other members of the family, to hold the witnesses under timorous submission to him so that his crime should be concealed.

WHITFIELD, C. J., delivered the opinion of the court.

It was error to allow prosecutrix to be asked as to her relations with other men. The only possible purpose of it was to bolster up her general reputation as to chastity, when that was not in issue at any time during the trial. The defendant did not assail it. That is settled in the two following cases:

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Madden v. *State,* 65 Miss., 176; 3 South., 328; *Williams* v. *State,* 79 Miss., 555; 31 South., 197. Without specializing, we may say, generally, that, whilst it was competent to show the treatment of the prosecutrix and of her mother, for the purpose of explaining the long delay in the prosecution, it was not competent to permit testimony to show appellant's treatment of other members of the household, who knew nothing of the alleged crime; and there is very much testimony of this sort improperly admitted. Those who knew nothing of the commission of the alleged offense could not, of course, reveal what they did not know, and any testimony as to their being terrorized by bad treatment was clearly incompetent. It was also error to permit the witness Sallie Ann Baker to testify to what she said the defendant had told her to swear, for the reason that the defendant had not introduced her as a witness. This testimony could only have been competent, if she had been introduced as a witness, for the purpose of discrediting her testimony. The court erred in permitting Noland and Saxon to testify about the noises which they said they heard at the defandant's house. The testimony was entirely too vague. They could not testify who made the noises, or what they were about.

We remark, lastly, that this is a case calling for the closest scrutiny of the testimony, by reason of the long delay. It is almost incredible that prosecutrix could not have made complaint against appellant, without fear, during the last three or four years at least. She was over twenty years of age, and it is very hard to believe that she was still under the terror of treatment inflicted while she was of tender years. There are other circumstances in her testimony far from satisfactory; such as not complaining while she was hired out, when she would have been fully protected. But we do not care to comment on the testimony at large beyond remarking that, stripped of the incompetent testimony, it is a very unsatisfactory case.

Reversed and remanded.

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Brief for appellant.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. LEONIDAS WATSON.

RAILROADS. *Crossings. Defective condition. Injury to traveller. Private road.*

If a railroad company, with knowledge of the use by the public of a road crossing its track, constructs approaches in such a manner as to render them dangerous to travelers using them with due care, it is liable to a person so using them who is injured because of their negligent construction, whether the road be a public or private one.

FROM the chancery court of Yazoo county.

HON. ROBERT POWELL, Judge.

Watson, appellee, was plaintiff, and the railroad company, appellant, was defendant in the court below. From a judgment in plaintiff's favor, defendant appealed to the supreme court. The opinion states the facts.

Mayes & Harris and *J. M. Dickinson,* for appellant.

It is well settled that unless the railroad company was under some duty or obligation to the plaintiff in this case, and had violated that duty to him, it would not be liable in this case for the injury which he sustained.

There is no evidence whatever in the case that the road on which plaintiff was injured was a public highway, and the fact that it was a private crossing is made out clearly by the plaintiff's own witnesses. It is true that they testified that other people than the landowner used the crossing, and the road, but that fact would not make it a public highway.

The fact that a road is a private road, a private neighborhood or plantation way, used by those persons who desire to use it, without objection on the part of the landowner, does not make it a highway within the meaning of the statute which requires

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Brief for appellee.

railroads to construct bridges, maintaining crossings, etc., at public highways. It does not bring the case within code 1892, § 3555, and it must be brought squarely within that section before the plaintiff in this case would be entitled to recover.

It is true that it is not necessary that the public authorities should have accepted the highway. *Harrison County* v. *Seal,* 66 Miss., 129. "But there must be some manifestation by unequivocal acts of the owner to devote a road on his premises to the use of the public." *Kinnare v. Gregory,* 55 Miss., 612.

Being a private way, the railroad company was under no duty to the plaintiff to maintain the crossing, or to keep it in any sort of condition for his use.

There is no proof in the record that the railroad company was under any obligation to any one in regard to this crossing. There is no proof that the owner of the land had made any objection, and, being a private way over his land, and he was content with the condition it was in, neither the public nor the plaintiff had any right to complain of its condition.

But if we should concede that there was evidence in the case tending to show that this was a public highway—if we concede that it was a public highway—the evidence in the case is overwhelming that the plaintiff's injury was caused by his own rash conduct in attempting to use the driveway as he did. The evidence of all the witnesses is that it was a very dangerous crossing. It was obviously dangerous. There were no hidden defects. The plaintiff himself testified over and over again that it was broad daylight, and he could see everything perfectly distinctly. There was nothing hidden.

Henry & Barbour, for appellee.

The statute is plain (code 1892, § 3555) in imposing upon railroads the duty to make proper and easy grades where its road crosses highways, and imposes a penalty of $100 for the failure to do so. Of course, it is well settled that the imposition of the penalty does not exclude the right of recovery of

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Opinion of the court.

actual damages for the failure to perform this statutory duty. Aside from the duty imposed by the statute, it is a common law duty.

We take the position, and we are supported by authority, that it was not necessary for the road in question to have been even a public road, but that, if it was used by the people in the neighborhood, and especially, as the record shows, by anybody and everybody who wanted to use it, and the defendant having recognized this right as is evidenced by the unquestionable facts in the record, and having by the construction of the crossing there, with the knowledge which the record shows, that it was being used by travelers, it then became their duty to safely and properly keep the crossing, and if they failed in that, are liable for any damage that resulted therefrom. *Mo. Pac. Co.* v. *Bridges,* 39 Am. & Eng. Ry. Cases; s.c. 74 Texas, 520; *Cross* v. *Lakeshore R. R.,* 69 Mich., 363; *Hanks* v. *Boston Railroad,* 174 Mass., 495; *Kelley* v. *Railroad Co.,* 28 Minn., 98; *Webb* v. *Portland R. R. Co.,* 57 Me., 117; 8 Am. & Eng. Enc. Law (2d ed.), 376.

Argued orally by *J. B. Harris,* for appellant.

CALHOON, J., delivered the opinion of the court.

There was evidence in support of the following facts: There was a road over the line adopted by the defendant below, appellant here, for its track. When rebuilt, it recrossed this road. It determined, for its own convenience, to move the line of its track higher up and on the side of a hill, to establish a better uniform grade, which it wanted. It did so; but, in rebuilding, it fixed the approaches so that on one side was a steep descent with two prongs, one, the left, leading into a plantation, and the other, the right, being a connection between two public roads, and for use by anybody and everybody who wished, as the old road was.

The right prong prepared by the railroad company was not

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only quite steep, as the old way, without prongs, was, but quite narrow, and had a sharp turn, and with a precipice on the side of eight feet, making it dangerous, and liable to cause accident to wagons and teams without great care. Plaintiff, who had never been over the crossing, undertook to make it over the right-hand prong, with a wagon and two mules, between daylight and sunrise, but when he could see everything distinctly. He could have selected the left prong, which was somewhat better, but he took the right, as it led directly to his destination, and, in making the turn on it, his mules, his wagon, and himself turned over the precipice in a tragic heap. His leg was broken, and continues painful, and will always be crooked. His companion jumped out and was safe.

Plaintiff suffered much and long, and will suffer his lifetime from the injury, and so, if he was entitled to recover at all, the verdict of the jury was reasonable. The old way was a steep descent, but was one broad way to and across the track, then in the valley below.

The appellant below had every charge that could be desired to the effect that no recovery could be had if the accident resulted from careless driving or the lack of ordinary prudence. We accept the finding of the jury on this.

On the contention that this was a private plantation road and crossing, and the company, therefore, was under no obligation to maintain it, it is sufficient to say that the question of permanent maintenance is not involved. It knew the road was used by the public, and, whether technically a public or private road, it undertook to build the approaches to its track, knowing the public use of it, and should not have made them so as to be dangerous for travel by teams and vehicles managed with ordinary care.

We are satisfied to rest on the authorities cited by counsel for appellee.

Affirmed.

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Brief for appellants.

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O'BRIEN BROTHERS ET AL. *v.* GEORGE A. WILSON, ADMINISTRATOR, ET AL.

1. EXECUTORS AND ADMINISTRATORS. *Appraisers.*

An administrator has nothing to do with the appointment of appraisers.

2. SAME. *Liability.*

An administrator is not chargeable with property of which he had no knowledge and is bound only to exercise the care of a prudent man in the management of his own business.

3. SAME. *Detention of exempt property by widow.*

Where all the property left by a decedent, including money, did not equal the exemption to which his widow was entitled, neither the administrator nor any one else can take the money from her or hold her liable for it, no exemption having been set aside to her.

4. SAME. *Deed of trust sale. Purchaser.*

An administrator may buy lands which belonged to his intestate from a purchaser, who, in good faith, acquired the title thereto at a valid sale under a deed of trust executed by the intestate.

FROM the chancery court of Leflore county.

HON. A. MC. KIMBROUGH, Chancellor.

O'Brien Bros. and others, appellants, were complainants, and Wilson, administrator, and others, were defendants, in the court below. From a decree dismissing the bill complainants appealed to the supreme court. The facts are fully stated in the opinion of the court.

S. R. Coleman, for appellants.

There was a breach of the conditions of the bond when the administrator failed to file a legal inventory of the estate. The inventory filed by him shows certain cotton without giving the

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Brief for appellees.

weight, price or to whom sold, and some money collected. Wilson qualified as administrator on January 18, 1900.

We find that the two notes referred to by him are not liens upon the funds in his hands, said funds being from the proceeds of crop of 1899, and said two notes not falling due until 1901 and 1902, and were liens on the crops of those years only. This misappropriation of the funds was a waste, and his bond was liable. 7 Am. & Eng. Enc. Law (1st ed.), 720; 73 Miss., 179.

What is the significance of this action by the administrator? On February 20, 1901, before this petition and order of court thereon, the administrator had, for the sum of $1,500, purchased a half interest in the estate, subject to the debts, from M. J. Bounds, the widow of W. A. Bounds, and she had purchased in February, 1900, under the deed of trust from herself and husband to H. A. McDonald. It was then to Wilson's advantage to pay off his debts on the property rather than the other creditors. Should this be allowed? Not when the two notes for the purchase money were not liens, and they were not upon the proceeds of the crop of 1899.

Wilson is now the owner of the entire estate, while his administration is still pending. We ask for a decree of reversal.

Gwin & Mounger, for appellees.

An administrator cannot be charged with property of the existence of which he was ignorant, or which never came into his hands. 11 Am. & Eng. Enc. Law (2d ed.), 973.

"An administrator is nothing but a trustee, bound for the care and caution of an ordinarily watchful man, nothing more." *Conwill* v. *Livingston,* 61 Miss., 641; Brame & Alexander's Digest, 453, 454; George's Digest, 281, § 130.

Moreover, this $200, the corn, stock of goods and all property alleged to have been taken by the widow Mrs. M. J. Bounds, do not amount to as much as she was entitled to take as exempt property for the support of herself and two children.

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Opinion of the court.

If she saw fit to hold and use this property, no exempt property being set aside to her, no one can complain. The administrator could not have taken it from her, and he is not liable for its value. *Grafton* v. *Smith,* 66 Miss., 408; *Jackson* v. *Wilson,* 117 Ala., 432; s. c., 23 So. Rep., 421.

It was not the duty of the administrator to have appraisers appointed, and, when the matter was brought to the attention of the court, appraisers were appointed.

CALHOON, J., delivered the opinion of the court.

These proceedings commenced with a bill in chancery filed September 4, 1901, by divers creditors of W. A. Bounds, deceased, against G. A. Wilson, the administrator of his estate, and the sureties on his bond. They charge the indebtedness of the estate to them severally, and that the decedent left a large real and personal estate, the latter consisting of mules, horses, wagons, farming implements, agricultural products, a stock of goods such as are usually kept by planters to supply tenants and employees, and debts due deceased.

They claim that Wilson, as administrator, has never filed an inventory, as required by law, and that no appraisers have been appointed, and claim that the fact of not returning an inventory was a breach of the conditions of the bond, and made the administrator liable for the amount of the complainants' claims. They charge that the decedent died owning large bodies of land bought on credit from various persons, secured by vendors' liens and trust deeds, and that one J. S. McDonald, who was president of the Delta Bank, and who died in 1898, before W. A. Bounds, who died January 11, 1900, was interested with Bounds in his real and personal property, including the mercantile business, and participated in the profits from all, and that, after McDonald died, Bounds executed a pretended deed of trust on lands and personalty to secure a pretended loan from Mrs. H. A. McDonald, the mother of J. S., in the sum of $20,000, and that it was foreclosed and sold for $26,650

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Opinion of the court.

after Wilson became administrator of Bounds' estate, whose widow, M. J. Bounds, bought, $20,000 being for the land and $6,650 for the personal property, which they charge should have gone to the administrator to pay debts. That Wilson was also administrator of J. S. McDonald's estate, and, besides, was his immediate successor as president of the Delta Bank, and knew all about the property of W. A. Bounds.

They charge that the widow, Mrs. M. J. Bounds, after buying at the trustee's sale, conveyed an undivided one-half interest to the heirs of J. S. McDonald, who reconveyed to her, and she recently conveyed the one-half interest to Wilson in his individual capacity, and he, as administrator, declines to pay the unsecured debts, but has applied all the funds to the lien and trust debts, which they say is a fraud, and that, in a pretended inventory, he charged himself with the value of certain agricultural products only, and claims that he applied the proceeds to trust debts; and they say that these products were raised on other than trust lands, and much of them belonged to tenants and employees, who delivered them to pay debts they owed Bounds.

The prayer is for decree for payment of complainants' claims, the appointment of appraisers, and that the administrator render complete inventory, and disclose what partners Bounds had, and their liability, if any, and for general relief.

This bill is not sworn to, and answer under oath is not waived, and there is no proof whatever to support several of its allegations.

In their answer, which is sworn to, the defendants deny all charges of fraud and pretense, and, in fact, each and every inculpatory charge in the bill. They deny that W. A. Bounds had a considerable stock of goods or debts due him when he died, and assert that all his land and personalty was incumbered to its value. They deny that the administrator did not file a full inventory, and say he did, and it is made an exhibit. They deny any partnership or interest in profits of J. S. Mc-

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Opinion of the court.

Donald with Bounds. They aver that Mrs. Bounds was a *bona fide* purchaser of all the property, and that her conveyance to the heirs of J. S. McDonald of a one-half interest was not to take effect until after the property paid itself out of debt, as per the instrument of conveyance, and these heirs reconveyed to her, and she conveyed this interest to Wilson with no interest in income, but to take effect only when all debts were paid.

The record shows that Wilson was duly appointed the administrator of the estate of W. A. Bounds January 11, 1900, and that he filed an inventory on March 16, 1900. Incorporated in the present record is a separate proceeding by the complainants herein to remove Wilson as administrator, based on practically the same grounds as set forth in the bill here, but the court sustained the inventory, and refused to discharge the administrator.

The inventory shows 174 bales of cotton, of total vale of $7,862.29, and it does not appear that any was omitted or that the price for which they were sold is not all right, or that creditors were in any way injured. The inventory shows that the land, stock, wagons, and farming implements had been taken and sold by the trustee in a deed of trust to W. A. McDonald for a debt of $27,000. There is no evidence of the invalidity of this debt, or in the sale made to pay it. On the contrary, it appears that the property brought full value, and so creditors are not hurt by this. Insolvency proceedings were begun by the administrator, and properly, so far as the record discloses. The debts to complainants were contracted after the execution of the trust deed.

An administrator has nothing to do with the appointment of appraisers.

It seems that W. A. Bounds in his lifetime bought various large tracts of land on credit, and was very much involved, the aggregate amount of indebtedness exceeding $40,000, and his hope was to work these places out of debt. We are con-

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cerned here with only a part of his purchases. Among others, what is known as "Moore's Lake Place" was bought, and the title vested in himself and his wife, Mrs. M. J. Bounds. Another place, known as the "West," or the "Beauty Place," he purchased at a large sum, and secured all the installment notes, amounting to about $20,000, by both vendor's lien and trust deed. He needed money in his farming operations, and, by arrangement, one J. S. McDonald accepted his draft to the vendor for $6,000 of the purchase price of this West place, and guaranteed the note of Bounds for the balance of the purchase money. In order to secure McDonald, Mr. Bounds gave a trust deed on this West place, which trust deed also covered money to be furnished by McDonald to run the two plantations, and he also agreed to convey his one-half interest in the Moore's Lake place, and in all his stock and farming implements, for which half interest McDonald paid him $1,500 in cash, but it was not to vest in McDonald until all the debts were paid. McDonald transferred this trust deed to the Delta Bank, of which he was president, the total debt secured by the trust deed being $20,000. J. S. McDonald died February 18, 1898, and defendant Wilson became his administrator and president of that bank. Mrs. H. A. McDonald, the mother of J. S. McDonald, loaned Bounds $20,000 to pay the Delta Bank, and agreed to furnsh him money to make a crop, and, to secure her, Bounds and his wife gave a trust deed covering both the Moore's Lake and West places, and they conveyed to the heirs of J. S. McDonald a one-half interest in the Moore's Lake place, not to take effect, however, until all the debts were paid. Mrs. McDonald carried out her agreement, and, when Bounds died on January 11, 1900, he owed her $26,500, and Mrs. McDonald wanted her money, but, it seems, everybody wanted to protect Mrs. Bounds as far as possible. Mrs. McDonald's son, J. B. McDonald, arranged with Mrs. Bounds that the whole property should be sold under the trust deed, and that, if Mrs. Bounds became purchaser, the necessary

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money should be advanced to Mrs. Bounds. So Mrs. Bounds bought the land and personalty under the trust deed, and then gave a trust deed to secure Mrs. McDonald for the money advanced. This trust deed covered all the crops raised by Bounds in Leflore county, and all the stock, farming implements, etc. Pursuant to the same arrangement, Mrs. Bounds conveyed a half interest to the heirs of J. S. McDonald, to take effect when all the debts were paid. The McDonalds procured money for her, but the crops failed, and they declined to advance any more. This trust deed had also become the property of the Delta Bank. Mrs. Bounds then applied to Wilson, the president of the bank, and that bank increased her debt to the amount of $32,000, when it became manifest that she could not work the place out of debt, and the bank foreclosed the trust deed. Wilson bought, and Mrs. Bounds, who had become Mrs. Helm, sold to Wilson the whole interest for $2,500, subject to all the incumbrances. She had no interest, as she testifies, in this litigation, but is made a witness.

She testifies that she held back from the estate of W. A. Bounds $200 in money, and that Bounds left a stock of goods worth $1,500, and that there were sixteen bales of cotton in the administrator's hands not raised on the West place, and about 600 bushels of corn, and that Wilson knew, as administrator of W. A. Bounds, that this stock of goods was there, and about the $200. The matter in this paragraph really embraces the whole ground of complaint.

The matter of the sixteen bales of cotton has heretofore been mentioned.

Bounds had no interest in the Moore's Lake place when he died, and all the crops were covered by the trust deeds. Wilson testifies that he knew nothing about the stock of goods, or the $200 in money, or the corn. As to the stock of goods, two disinterested witnesses say that there was no such stock there, but only a few remnants not worth over $25, and a disinterested witness says that there was only sixty bushels of corn,

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and this was mixed with other corn on the place. Besides this, it is clear that the trust deed to Mrs. McDonald carried the corn raised by Bounds anywhere in Leflore county, and was sold under that trust deed, and bought in by Mrs. Bounds to use by her, except what was used on the place before the sale. On the facts, the chancellor found against the creditors and in favor of Wilson.

An administrator is not chargeable with property of which he has no knowledge, and is bound only to exercise the care of a prudent man in the management of his own business. Besides, all this property, including the $200, would not equal the exemption to which Mrs. Bounds was entitled; and creditors of W. A. Bounds have no right to complain, as the administrator could not—nor any one else—take it from her, or hold her liable for it if she had held and used it, no exemption having been set aside for her.

The charge in the bill that there were collectible debts due by tenants or others to Bounds is without support; on the contrary, the reverse is shown by the proof.

It is clear from this record that Wilson did not desire to own any interest in the property, his purpose and wish being to secure it for Mrs. Bounds, and at the same time protect the Delta Bank, and, after he bought, he made unavailing efforts to sell at what he gave. He had tried to induce her second husband to invest, but he and his wife were opposed to putting any money into the property.

We know of no law or reason forbidding Wilson to buy the property from the purchaser under a trust deed. There is no evidence whatever that there was any fraud or pretense attending any of the loans of money, or any of the trust deeds, or the trust sale, and certain, it seems, there was no act of which the creditors of W. A. Bounds could complain, and these creditors had record notice of the trust when they extended the credit to W. A. Bounds.

We think the chancellor's conclusion was right.

Affirmed.

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Statement of the case.

WESTERN UNION TELEGRAPH COMPANY v. ELIZABETH WATSON.

1. TELEGRAPH COMPANY. *Wilful delay. Punitive damages. Message announcing death.*

Where a telegraph company received for transmission and delivery a message to a woman announcing the death of her husband, but failed to deliver the same for several days, its failure being without excuse and so negligent as to amount to willfulness, it is liable to the sendee for punitive, as well as actual, damages.

2. SAME. *Actual damage.*

In such case the plaintiff cannot recover an item of actual damage not shown to have been suffered.

FROM the circuit court of, second district, Panola county.

HON. PERRIN H. LOWREY, Judge.

Mrs. Watson, appellee, was plaintiff, and the telegraph company, appellant, defendant, in the court below.

John Watson, the husband of appellee, in his lifetime, lived with his family, seven or eight miles from Batesville, in Panola county, Mississippi. He suffered from a cancer, and in November, 1900, went to Birmingham, Ala., to be medically treated. He grew worse, and died on Wednesday, December 12, 1900. His brother-in-law, at whose house he died, telegraphed Mrs. Watson, widow of decedent, at about 7 o'clock Thursday morning, and asked what to do with the corpse. This telegram was not delivered to Mrs. Watson until about a week after it was sent from Birmingham, and several days after her husband had been buried, near Birmingham. She brought this suit to recover damages caused by the negligence of the telegraph company, in failing to deliver the message. The testimony showed the following facts: Mr. Hagood, the sender of the message, called at the Western Union Telegraph office at North Birmingham early Thursday morning, December 13,

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Opinion of the court.

and delivered the message to the telegraph operator, and paid for same the price charged; he called twice again that day, and once on December 14, and was told that nothing had been heard from the message; he called again in the evening of December 14, and was then informed that the message could not be delivered; the body of John Watson was interred December 15, nothing having been heard from Mrs. Watson. John Watson, son of Mrs. Watson, called at the Western Union Telegraph office at Batesville twice on the 13th of December, the day the message was received, and asked if there was anything there for Mrs. Watson, and was told that there was not; he called again on Decemebr 14, and asked if there was anything for Mrs. Watson, and was again told that there was not; he and his brother were in Batesville nearly every day, and were well known to the people in Batesville and had an aunt living there who was also well known, named Watson. The message was not delivered until the plaintiff's son, John, went to the operator at Batesville and told him he had a letter from Birmingham, telling him that a telegram had been sent to Mrs. Watson, when the operator hunted it up and gave it to him. Mrs. Watson and her family knew nothing of her husband's death until several days after he had been buried in Birmingham.

There was a verdict and judgment for plaintiff for $1,000, which was shown to include the $100 item mentioned in the opinion of the court. Defendant's motion for a new trial was overruled, and it appealed to the supreme court.

Mayes & Harris, for appellant.

Pearson & Lamb, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

We cannot concur in the estimate put by learned counsel for appellant upon the strength of the case made by appellee. We are clearly of the opinion that the evidence makes out a plain

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Brief for appellants.

case of willful disregard of the rights of the appellee, and fully warrants the imposition of exemplary damages. Since there was willful wrong, the Rogers case, 69 Miss., 748; 9 South., 823; 13 L. R. A., 859; 24 Am. St. Rep., 300, has no application. It was error, however, to allow proof of the cost — $100 — of exhuming and reinterring in Batesville the body of appellee's husband. There is no evidence that she had caused this to be done. It was clear that she had not incurred such expense.

If $100 shall be remitted, the judgment will be affirmed; otherwise, reversed and remanded.

JAMES T. WHITE ET AL *v.* GEORGE LEATHERBERRY ET AL.

CONTRACT. *Breach. Profits. When recovered. Established business.*

The anticipated profits of an established business, which would not be speculative, but the direct and immediate fruits attending the performance of a contract, may be recovered for its breach.

FROM the circuit court of Jackson county.

HON. WILLIAM T. MCDONALD, Judge.

White and another, appellants, were plaintiffs and Leatherberry and another, appellees, were defendants in the court below.

The defendants' demurrer to plaintiffs' declaration was sustained in the court below; plaintiffs did not amend, a judgment final was rendered in defendant's favor and plaintiffs appealed to the supreme court. The opinion of the court states the facts.

Dodds & Griffith, for appellants.

If chattels are purchased for resale, and upon breach of the executory contract of purchaser, other goods cannot be obtained

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for such resale, the difference between the market price at the place of resale and the contract price may be recovered. This rule is laid down in all the books. American & English Encyclopedia, first and second editions, Sedgwick on Damages, Wood's Mayne on Damages, Hale on Damages and the other texts, and we will cite three lumber cases as follows:

Campbellsville Lumber Co. v. *Bradlee et al,* 29 S. W. (Ky.), 313, where it was held that the proper measure of damages was "the difference between the contract price and the value of such lumber in the markets where plaintiff traded, less the cost of transportation," and

Cockburn v. *Ashland Lumber Co.,* 12 N. W. (Wis.), 49, where it was held that the damages would be ascertained by adding to the contract price of the lumber the cost of transporting it, including the insurance and fees of inspection and any other expenses necessary in putting the lumber on the market at Q, and deducting this amount from the market price at Q; and

Trigg et al v. *Clay et al,* 13 S. E. (Va.), 434, goes even further than the two first above, and cites many authorities.

In the instant case appellants bought the logs for the purpose of reselling them—as lumber indeed, but the cost of the logs added to the cost of sawing them is the cost of the lumber, and under the principle invoked the difference between this and the market price of the lumber is the measure of damages. This is and was an established sawmill business; the cost of changing the logs into lumber is susceptible of almost exact computation and proof; these people from their whole past experience can figure to the dollar how much it cost them to so prepare their lumber; it can be made as certain as transportation, insurance and other expenses mentioned in Cockburn case, 12 N. W., 49, *supra.* By defendants' breach they were prevented from so preparing the logs and selling them as prepared for the market. We urge upon the court the difference between a new business and an established one; they stand on entirely different

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footings. An established business can show the necessary data; a new business can only guess. It was at one time laid down that no damages could be recovered for the loss of profits. It is well stated now, however, that such damages may be recovered, and the usual and ordinary profits of an established business are reasonably certain, and may be recovered in an action involving the interruption of the business. Hale on Damages (a new work on the subject), p. 72-4.

Ford & White, for appellees.

The damages claimed are purely speculative, and cannot be recovered. The measure of damages for the breach of a contract for the sale of saw logs, is the difference, at the time of the breach, between the contract price and the market price of the commodity. *Bickell* v. *Colton,* 41 Miss., 368; *Kodish* v. *Young,* 48 Am. Rep., 548; *Murray* v. *Dowd,* 59 Am. St. Rep., 297.

The damages claimed in this case fall clearly within the rule announced in the case of *Hadley* v. *Boxendale,* 9 Exch., 341, and followed by this court in the case of the *Vicksburg, etc. R. Co.* v. *Ragsdale,* 46 Miss., 458, and all subsequent cases bearing on the subject.

WHITFIELD, C. J., delivered the opinion of the court.

The court erred in sustaining the demurrer to the declaration in this case. The declaration was drawn with exceptional care and ability, and omits no allegation necessary to the statement of a good cause of action. The case should have been developed on its facts. The very ingenious and able argument of counsel for appellee is out of place in support of a demurrer which admits as true the averments of this declaration. It would have been very pertinent, had the case gone to the jury, when the time to settle the instructions had come. The declaration avers that the defendant failed to deliver 1,057 logs; that the business of plaintiff was an established sawmill business;

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that its business was interrupted by reason of the failure to deliver for fourteen days; that the 1,057 logs would have sawed up into 246,400 feet of lumber; that the net profits of the plaintiff, above each and every item of expense, would have been $3 per thousand feet; that the plaintiff would have made this profit in the ordinary course of its business; that, when so converted into lumber, the lumber would have been put upon the market for sale, in the usual and ordinary course of the plaintiff's said business; that there was an established and well-known market price for such lumber at Moss Point—the place of delivery; that plaintiff would have immediately sold all of the lumber on said market at a profit of $3 per thousand feet; that defendant well knew the purpose and use for which the plaintiff had bought said logs, and that loss would likely come by its failure to deliver said logs, as a natural and proximate consequence of such failure, in the ordinary course of the sawmill and lumber business; and that the defendant, through its officers and agents, was well acquainted with all said facts, and that said consequences were within the contemplation of the parties at the time of the making of said contract. It must be perfectly obvious that a demurrer which admitted these facts could not properly be sustained.

The true measure of damages in cases of this sort is that stated in *Campbellsville Lumber Co.* v. *Bradlee et al* (Ky.), 29 S. W., 314, where the court says: "The only question about which there need be any discussion is whether the following instruction was properly given: 'The court instructs the jury that in arriving at the amount of damages, if any, they will take into consideration the difference between the contract price and the value of such lumber in the market where plaintiff traded, less the cost of transportation.' In Sedgwick on Damages, § 734, it is said: 'When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the

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measure of damages is the difference between the contract price and the market value of the article at the time when and place where it should have been delivered, with interest.' And this court has often sanctioned that general rule. But it does not govern where its application would change the contract actually made, or contravene the intention of the parties. Therefore, when the vendor knows his chattels are being purchased for resale at a particular place, he should be held to have contemplated, as a probable result of his failure or refusal to deliver according to the contract, a recovery by the purchaser of the difference between the contract price and market value at such place of resale, less cost of transportation."

So, in *Trigg* v. *Clay* (Va.), 13 S. E., 435; 29 Am. St. Rep., 723, in stating the measure of damages proper in lumber contracts of this character, the court says: "Under the circumstances of this case, the commissioner ascertained the true and just amount of the damages. It has been often held that profits which are the direct and immediate fruits of the contract are recoverable. There are many cases in which the profits to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages. Wood's Mayne, Dam. p. 82. It has been held that, when the defendant refused to allow the contracts to be executed, the jury should allow the plaintiffs as much as the contract would have benefited them — profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, and part and parcel of the contract itself, entering into and constituting a portion of its very element, something stipulated for, and the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. If the inducement to the plaintiffs to buy this lumber — they being lumber dealers, and trading in lumber — was not the

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profits they were to make by a resale, what was their inducement? And if the sellers did not understand and contemplate this resale on a profit, what contemplation on the subject can be reasonably ascribed to them? *See Masterton* v. *Mayor,* etc., 7 Hill, 62 (42 Am. Dec., 38); *Morrison* v. *Lovejoy,* 6 Minn., 39 (Gil., 224); *Fox v. Harding,* 7 Cush., 516; *Devlin* v. *Mayor, etc.,* 63 N. Y., 8; *McAndrews* v. *Tippett,* 39 N. J. Law; 105; *Kendall Bank Note Co.* v. *Commissioners of the Sinking Fund,* 79 Va., 563; *Bell* v. *Reynolds,* 78 Ala., 511 (56 Am, Rep., 52). An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract; in other words, for the penefits and gain he would have realized from its performance, and nothing more. It is sometimes said that the profit that would have been derived from the performance cannot be recovered; but this is only true of such as are contingent upon some other operation. Profits which certainly would have been realized but for the defendant's default are recoverable."

See, also, as directly in point, *The Miss. Boom Co.* v. *Prince* (Minn.), 24 N. W., 346; *Cockburn* v. *Ashand Lumber Co.* (Wis.), 12 N. W., 50-53, inclusive. Special attention is called to this last case, the court observing, at page 53, as follows: "Whether the plaintiffs intended to sell the deals in the Quebec market or not, they purchased them for shipment to that market, and for some use there, and by any just rule they are entitled, under the peculiar circumstances of the case, to have the benefit of the market price there in the estimate of their damages. We think it may reasonably be supposed that the parties contemplated this as a result of a breach of the defendant's agreement to deliver the deals. The defenadnt company was cognizant of facts which make such presumption almost conclusive against it. Hence, within the rule of *Hadley* v. *Baxendale,* the market price at Quebec of deals like those contracted for, at the times when in the usual course of transportation they

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could have reached there, had both parties fulfilled their contract, say in August and September, 1878, is the basis upon which the plaintiff's damages should be assessed. From this value should be deducted the cost of transportation, including insurance, the fees for inspection, and other expenses (if there were any) usual and necessary to put the deals upon the market. The difference between that balance and the contract price is, we think, the proper measure of the plaintiffs' damages as the case now stands."

It must be borne in mind that this was a contract made in the sawmill business, for the purchase of logs to be manufactured and sold as lumber, and whatever would be the usual course of dealing by the purchaser with the logs purchased, in the usual and ordinary course of such business, must necessarily have been known to the defendant, and within the contemplation of the parties, at the time the contract was made. Ragsdale's case, 46 Miss., 483, states the rule thus: "(1) The proximate and natural consequennces of the breach must always be considered; (2) such consequences as, from the nature and subject-matter of the contract, may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into." It is within this second category that this case falls. It would not be reasonable to hold, in reference to the lumber business as conducted in this state—one of its largest and most important interests—that one contracting with reference to that business, as the defendant is averred to have done here, knowing that the logs were bought for resale after having been manufactured into lumber, perfectly aware that the plaintiff's business was an established one, and that there was already a market at special market price for the manufactured lumber, should be permitted to say that he did not have in contemplation, at the time of the contract, the course of dealing uniformly obtaining in that business under such circumstances. It will be noted that in the Ragsdale case, at page 484, 46 Miss., the fifth category stated by Judge Simrall refers

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Statement of the case.

alone to a "new business." The declaration specially avers this business to have been an "established" one, and a different principle obtains in reference to an established business as to the rule of damages, as pointed out in the authorities collated in the brief of counsel for appellant.

It will be observed that we are dealing alone with the demurrer. If, when the proof comes, the averments of the declaration shall not be maintained, it will be time enough to deal with profits that are purely speculative, by proper charges to the jury. But on this declaration—one of the most accurately drawn that has ever come before this court—the demurrer should have been overruled.

Judgment reversed, demurrer overruled, and cause remanded.

BRANCH T. ARCHER ET AL *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

DEEDS. *Life estate. Conveyance by remainderman. Construction. Estoppel.*

Where a son owned under a trust deed executed by his father the exact interest in lands which he would have inherited, on the death of his father intestate, had the deed not been executed, and after the death of the father conveyed, for a valuable consideration, all the interest he had in the lands "as heir of his father," he will not be permitted in equity to retain the consideration received and claim that his conveyance was wholly inoperative, but his deed will be construed as conveying his interest in the land.

FROM the chancery court of Claiborne county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

The railroad company, appellee, was complainant in the court below; Archer, appellant, was defendant there.

In 1847 Richard T. Archer conveyed his lands in Claiborne county to S. and J. Coburn, in trust for the use and benefit of

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Brief for appellants.

his wife, Ann B. Archer, for her natural life, and at her death to such child or children of said Ann B. Archer as should be living at the time of her death. Both of the Coburns died, their estates having been fully administered. On March 5, 1883, Mrs. Ann B. Archer conveyed to the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, to all the rights and property of which the Yazoo & Mississippi Valley Railroad Company succeeded, a right of way 100 feet wide across this land. Her deed purported to convey a fee simple title to this strip of land. The railroad company entered upon the land, and constructed and operated its railroad thereon. On January 23, 1888, Branch T. Archer, one of the children of Richard T. and Ann B. Archer, conveyed to his mother, Mrs. Ann B. Archer, for the consideration of $400, all his right, title and interest in said lands, the deed reciting that it was his purpose to convey to her "all interest he might have in any and all lands as heir of his father." In 1898, after the death of Mrs. Ann B. Archer, Branch T. Archer and the other children of Mrs. Ann B. Archer who were living when she died had a partition of said lands by agreement, but the railroad company had no notice of it, and a part of it was set apart to Branch T. Archer. Branch T. Archer and others taking under the deed of Richard T. Archer brought an action of ejectment against the Yazoo & Mississippi Valley Railroad Company to recover this strip of land granted for a right of way. The Yazoo & Mississippi Valley Railroad Company then brought this suit in the chancery court to enjoin the ejectment suit, and asked the court to set aside to it, out of the part set aside to Branch T. Archer in the partition, the land occupied by it as a right of way. Form a decree granting the relief sought in the bill, defendants appealed to the supreme court.

J. McC. Martin, for appellants.

Both Ann B. Archer and her children actually surviving her took the land in question under the trust deed, and not by de-

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Brief for appellants.

scent. Richard T. Archer, at his death, left no estate whatever in "Redding Bottom"; hence the deed of B. T. Archer, now presently considered, conveyed no title subsequently to Mrs. Ann B. Archer. The contention of appellee in the lower court was: That Ann B. Archer acquired a fee simple undivided interest in "Redding Bottom" by the deed of B. T. Archer, made to her on the 23d day of January, 1888. At the date of said deed B. T. Archer had an interest of an undivided one-seventh in the said one hundred-feet strip, through the "Redding Bottom," constituting a right of way of appellee, contingent on his surviving his mother, Ann B. Archer. His deed does not attempt to convey this. It attempts to convey "All his right, title and interest in and to any and all real estate in said Claborne county of which his father died seized and possessed, whether his right be in possession, remainder or reversion. He recites in said deed that it is his intent to convey any and all interest he may have (subject to Ann B. Archer's dower) in and to any lands he may have as heir of his father in said county." He had, as above stated, no land from his father in said "Redding Bottom," as heir, and his mother had no dower right in same. Hence, the deed he made her really conveyed nothing.

The contention is, then, on the part of appellee, that the deed to Ann B. Archer, made in 1888 by B. T. Archer, relates back to the deed she made five years before to the N. O., B. R. & M. R. R. Co. That thus it puts in the appellee his undivided interest in "Redding Bottom," because his mother made a fee simple deed to said railroad, which ought to make her after acquired fee simple enure to it, as fully as though she had the same at the date she made her deed in 1883.

In reply to said contention, appellants say: First, all improvements made by the N. O., B. R. & M. R. R. Co., and its successors, were made long prior to the deed from B. T. Archer, and were made under the deed to the life estate, and no other; that thereby their rights became fixed, and that they could not

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Brief for appellee.

complain or demand recognition of any claim for improvements made under said deed of 1883. Second, that, even if deed from B. T. Archer is a good and valid conveyance of his interest in "Redding Bottom" to his mother, yet it would not enure to appellee, and would not, and could not, affect the *status* of his cotenants. They would be entitled to an undivided six-sevenths interest in said "Redding Bottom" strip of one hundred feet, with all improvements. Further, that all are entitled to the said strip, as and under said trust deed to the Coburns, and as remaindermen, while the said B. T. Archer, if his deed to his mother should be effective, is entitled to an undivided one-seventh of an undivided one-seventh as heir-at-law of his mother. Third, that said appellee can take nothing under the B. T. Archer deed to Ann B. Archer, and, if they could, would not be entitled, under the facts and law, to have the particular one hundred-feet strip, through "Redding Bottom" set aside as its interest under such B. T. Archer deed, as it cannot assume such to be the interest of B. T. Archer deeded to his mother, as they did not make any of the improvements put on said one hundred-feet strip after he made his deed aforesaid.

Mayes & Harris, for appellee.

The theory of the bill and the authority upon which it is founded will be found in the case of *Paddock* v. *Shields,* 57 Miss., 340. The railroad company, having taken possession of and improved a small portion of the common property, was entitled to have that portion set apart to it. It does not seem to be seriously contended by counsel for the appellant that this could not be done in the proper case. He seems to be struggling desperately with the proposition that Branch T. Archer had nothing whatever to convey to Ann B. Archer; that his deed to her conveyed nothing, and, therefore, that the railroad company could not in this case set up as against him or any of the other tenants that it had any interest in the land after the

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Brief for appellee.

death of the said Ann B. Archer. This contention, we think, is utterly without merit.

The interest of B. T. Archer in the land was a vested remainder, and as such was transferable.

On this subject see Vol. 20 A. & E. Ency. Law (1st Ed.), p. 839, and authorities cited. Tiedeman on Real Estate (1st Ed.), secs. 37, 402, 403, 411, 420, 421, 424.

Branch T. Archer, having conveyed all of his interest to his mother, cannot certainly set up any title as against the railroad company in the lands which he purported to convey to his mother. *McInnis* v. *Pickett,* 65 Miss., 354; *Bramblett* v. *Roberts,* 68 Miss., 325; *Hunt* v. *Wright,* 70 Miss., 304; *Chambliss* v. *Person,* 77 Miss., 806.

The court will bear in mind that it is not set up in the answer anywhere that any of the other parties' interest in the "Redding Bottom" field would be injured in any way by this partition. No plausible defense is set up. It is contended, however, by counsel in his brief that they would be entitled to an interest in the improvements which the railroad company has put upon the ground, which, so far as anything appears, is but the roadbed and superstructure.

It is very well settled in this state that they could have no claim and no benefit from the improvements of this character put by the railroad company on the land.

It is settled in this state that the rule in regard to fixtures and improvements which long existed at common law has no application whatever to the chattels fixed to the freeholder by a railroad company. See *R. R. Co.* v. *Dickson,* 63 Miss., 380; *R. R. Co.* v. *LeBlanc,* 74 Miss., 674.

It is perfectly manifest from the facts set forth in this record that these parties are barred long and long ago. The railroad company has been in actual possession for nearly twenty years, and the trust deed under which these parties claim was executed in 1874. The trustees were long since barred.

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Opinion of the court.

The railroad company has been in possession, claiming the land adversely to everybody, under a deed, absolute on its face, conveying a fee simple, and all these parties now suing are barred. Code 1880, § 2694.

CALHOON, J., delivered the opinion of the court.

If Ann B. Archer had owned the fee in the right of way, the railroad company got it by her deed of date March 5, 1883. But she did not own the fee, but a life estate only, and the railroad company got that alone by the deed, and stood then in her shoes, with all her rights, and none other. If any interest whatever passed by the subsequent conveyance of January 23, 1888, by Branch T. Archer to Ann B. Archer, who was his mother, this interest inured to the railroad company. This conveyance purports to carry in fee his undivided interest as "heir at law" of his father, Richard T. Archer. In fact, he had no interest as such heir at law, but he did own an interest as remainderman, to take effect at the death of his mother, identical with that he would have had as such heir if his father had never executed the deed in trust to the Coburns. His mother manifestly intended to buy this interest, and paid him $400 for it, and he manifestly intended to convey this interest to her. If he did so intend, the description of his title as being heir at law of his father was an honest mistake of fact, not of law. If he did not so intend, his representation of the derivation of his title was a glaring and palpable fraud. In either case he cannot, in a court of equity, where he now is, be heard to say that his solemn conveyance was a mere farce, carrying absolutely nothing to his mother for the $400; and even this he does not offer to restore. The railroad company has the right to hold and to have the right of way taken out of Branch T. Archer's share of the estate for its ownership.

Affirmed.

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Statement of the case.

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LOUISA LARSON v. JOHN LARSON ET AL.

1. ALIMONY. *Personal judgment. Process. Code* 1892, § 3421. *Publication only.*

Under code 1892, § 3421, providing for publication of summons for non-resident defendants, a personal judgment for alimony cannot be rendered in favor of a wife against her non-resident husband upon proof of publication only.

2. HUSBAND AND WIFE. *Homestead. Conveyance. Code* 1892, § 1983. *Insanity.*

A wife cannot maintain a suit to vacate a deed conveying his homestead, in which she did not join, made by her husband after he had abandoned her and the homestead, because of the insanity of the husband at the time of the execution of the deed.

3. SAME. *Ejectment. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her when he executed the deed to the plaintiff.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Mrs. Larson, the appellant, was complainant in the court below, her husband, John Larson, and his vendees of the homestead, appellees, were defendants there.

The bill of complaint showed the marriage of the complainant to the defendant, John, his abandonment of his wife and removal from Mississippi to Minnesota, and further showed all the necessary facts to entitle the wife to recover a personal decree for alimony, but the husband was served with process only by publication in a newspaper under code 1892 § 3421. The bill further charged that the husband had become insane, and that, after his abandonment of the wife and the homestead, he executed a deed to his codefendants purporting to con-

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Brief for appellant.

vey his homestead, in which the wife did not join, conveying the same for a grossly inadequate sum, not exceeding one-fifth its value, and that the vendees in said deed had begun an action of ejectment against complainant for said homestead.

The bill sought an injunction against the ejectment, the cancellation of the deed, a decree for alimony, and prayed that the decree for alimony, temporary and permanent, be adjudged a lien on the homestead.

The chancery court denied all relief, the chancellor delivering a written opinion, holding that the wife had no such interest in the homestead as would enable her to have the deed canceled, citing *Thoms* v. *Thoms,* 45 Miss., 263; *Massey* v. *Womble,* 69 Miss., 347; s.c. 11 So. Rep., 188; *Pounds* v. *Clarke,* 70 Miss., 263; s.c. 14 So. Rep., 22; *Gatti* v. *Supply Co.,* 77 Miss., 754; s.c. 27 So. Rep., 601; *Duncan* v. *Moore,* 67 Miss., 136; s.c. 7 So. Rep., 221. The chancellor further found that John Larson, the husband, was insane, and that alimony could not be granted in this proceeding, because of his insanity, and because he had not been personally served with process.

The bill having been dismissed, the complainant appealed to the supreme court.

Ford & White, for appellant.

The case at bar presents a different state of facts and is different in its legal aspect from any of the cases cited by the learned chancellor in support of his position. While, as a rule, the wife has no vested interest or title to the homestead, where the title is in the husband, this case falls squarely within the rule laid down in *Scott* v. *Scott,* 73 Miss., 575. The wife was entitled to a support out of the husband's property, and to that extent she had a property interest in it which would give her standing in a court of equity to protect the title.

There is nothing in either the pleadings or proof to show that Larson was wholly insane, but it is clearly established

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Brief for appellees.

that his insanity was only partial, and, even had the learned chancellor been correct in the position that a lunatic can only be sued by having a guardian appointed and making the guardian a defendant, that rule would not apply in this case, from the fact that his insanity was only partial, and was not of such nature as to prevent him from making a defense, but, on the other hand, if it had any effect, it would be to cause him to defend more vigorously. But we submit that, even if Larson had been wholly insane complainant could have sued without his having a guardian. 16 Am. & Eng. Enc. Law (2d ed.), 601; *Ex parte Northington,* 79 Am. Dec., 67 (37 Ala., 496); *King* v. *Robinson,* 54 Am. Dec., 614 (33 Maine, 114); *Allison* v. *Taylor,* 32 Am. Dec., 68 (6 Danna [Ky.], 87); *Maloney* v. *Dewey,* 11 Am. St. Rep., 133 (127 Ill., 395); *Stigers* v. *Bruet,* 33 Am. Rep., 317 (50 Md., 214).

The position of the chancellor that Larson was not served with process in this state no decree for alimony could be rendered against him, may be sound so far as it relates to a judgment *in personam,* but it is undoubtedly unsound insofar as it denies the right to a judgment *in rem;* for surely no court would hold that a husband, whether wholly sane or not, having valuable property in this state, can abandon his family without cause, and leave them to suffer for the necessaries of life while he lives in affluence in another state upon the income from his property in this state; and because he cannot be served with process in this state the courts are powerless to subject his property to a decree for the support and maintenance of his wife and children. The chancery court has jurisdiction of a bill filed against a nonresident having property here to redress a wrong, even if the damages are unliquidated. *Gordon* v. *Warfield,* 74 Miss., 553.

Harper & Potter and *Harper & Harper,* for appellees.

The bill makes Larson a defendant, and alleges that he is a nonresident of Mississippi. He is brought into court by

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Brief for appellees.

publication only, without any attachment or seizure of property. It is true that the bill prays for relief against specific property of defendant, but the notice published does not indicate in any way that complainant seeks any relief against any specific property. It is universally held that a demand for alimony or support is a money demand, and, therefore, strictly a suit *in personam,* and not *in rem.* Being a money demand, a decree could not be rendered against Larson therefor without personal service. Now, a suit *in personam* can only be converted into a suit *in rem,* in Misssisippi, against a nonresident, by attachment. The code of 1892, in §§ 486, 488, provides the only way in which land of a nonresident could be subjected to money demands in Mississippi. Those sections must be strictly followed. The case of *Penoyer* v. *Neff* expressly distinguishes such kinds of personal demands and personal actions, from the right that every state has to fix the status of its own citizens and the title to property within its own jurisdiction. There is a manifest distinction between assuming jurisdiction over proceedings to establish title to or rights in land, such as removing clouds from title, partition, foreclosing liens, etc., and, on the other hand, creating and establishing a personal claim to be satisfied out of land. *Bunnell* v. *Bunnell,* 25 Fed. Rep., 215; *Madden* v. *Fielding,* 19 La. Ann., 505; *Ellison* v. *Martin,* 53 Mo., 575; *Prosser* v. *Warner,* 47 Vt., 667.

The wife of an insane person cannot attack the deed of the husband. *Kildee* v. *Myrick,* 12 Fla., 419; *Valfwin* v. *Gold,* 83 N. Y., 115; *McMillan* v. *Deering,* 139 Ind., 70; *Breckinridge* v. *Armsboy,* 11 J. J. Marshall (Ky.), 239; s.c. Am. Dec., 71; *Atwell v. Jenkins,* 163 Mass., 362; s.c. 47 Am. St. Rep., 463; *Key* v. *Davis,* 1 Md., 43; *Johnson* v. *Branch,* 62 Am. St. Rep., 862.

Argued orally by *W. A. White,* for appellant, and *W. R. Harper,* for appellee.

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Syllabus.

CALHOON, J., delivered the opinion of the court.

No doubt the chancellor below was as reluctant to decide in the way in which he did as we are to sustain him. But we must affirm the decree rendered by him on the authorities cited in his opinion and in the briefs of counsel. Service by publication on a nonresident defendant in suit for alimony is not enough. The law in regard to *in rem* proceedings has no application to the facts of this case. Insanity of a grantor in a conveyance may be shown by the defense in an action of ejectment.

Affirmed.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. DANIEL WHITE.

1. RAILROADS. *Flag stations. Failure to stop. Ignoring signals. Exemplary damages.*

Where the engineer of a passenger train saw and understood, but disregarded a signal to stop at a flag station when it was his duty to have stopped, and no reasonable explanation of his failure to stop is made, a question of fact is presented for the jury to determine whether his acts were characterized by malice, willfulness, wantonness, etc., justifying the award of exemplary damages.

2. SAME. *Instructions.*

In such case the plaintiff having asked and received an instruction to the effect that the jury might award exemplary damages if they believed the failure to stop was willful, reckless or capricious, it was error for the court to refuse an instruction asked for by defendant directing the jury not to award exemplary damages if the engineer did not act maliciously, deliberately, willfully or wantonly.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

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Opinion of the court.

White, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment for plaintiff, defendant appealed to the supreme court. The facts are stated in the opinion of the court.

Smith, Hirsh & Landau and *Mayes & Harris,* for appellant.

The court erred in refusing the instruction asked for by the defendant.

The court had already given an instruction for the plaintiff, that, if they believed that the failure to stop the train by the engineer was wilful, reckless, or capricious on his part, that they could find punitive damages, and the defendant was certainly entitled to ask, and have given, an instruction, that, if the defendant engineer did not act maliciously, or deliberately, or wilfully, or wantonly, in not stopping the train, they could only find actual damages.

Green & Green and *McLaurin & Thames,* for appellee.

Whether the conduct of the engineer was wanton, or wilful, or capricious, was peculiarly a question of fact for the jury.

If the engineer saw the signal and ran by the station without stopping, then this was such gross negligence and reckless disregard of consequences as to justify punitive damages. The instruction wholly omits the imposition of punitive damages for "recklessness" or, "in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences." *Chicago, Etc., R. Co.* v. *Scurr,* 59 Miss., 461; *Wilson* v. *New Orleans, Etc., R. Co.,* 63 Miss., 356.

Argued orally by *Murray F. Smith,* for appellant, and *Marcellus Green,* for appellee.

PRICE, J., delivered the opinion of the court.

On Sunday, August 11, 1901, White purchased a round trip ticket from Vicksburg to Glass Station, on appellant's rail-

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road, entitling him to transportation, and in the afternoon of the same day he was at Glass Station in readiness to begin his return trip to Vicksburg. When defendant's passenger train No. 22 approached the station, White flagged the train with an umbrella and a shoe box, which he waved across the track. The train was about one-half a mile away when White began flagging it. The whistle blew, but the train ran beyond the station from two hundred to four hundred and fifty yards, where it stopped to put off two passengers. Glass Station is ten miles south of Vicksburg, and White worked on a dredge boat, and it was necessary for him to be in Vicksburg the next morning, or perhaps lose his job. Failing to get on board the train, he walked to Vicksburg, arriving there between ten and eleven o'clock at night; and it was a rainy evening. The engineer testified that he was at his post of duty, keeping a lookout; that Glass was a flag station, and when he reached the proper point he whistled for flags, and saw none; that there was no signal given to stop; that if he had been flagged, and knowingly ignored it, he would likely lose his job. The conductor testified that he stopped his train one-fourth of a mile north of Glass, for the reason that there was a young man on the train with a round trip ticket from Port Gibson to Vicksburg, and, as the train was passing by Glass Station, the passenger asked to be put off there, and the conductor signaled the train to stop, and the passenger, with another, got off.

On this statement of facts the court gave for plaintiff the following instruction: "The court instructs the jury that, if they find for the plaintiff, they may, in addition to actual damages, assess punitive damages—that is, damages by way of punishment, to compel defendant to have due regard for the rights of the public—in such sum as they may see proper, not to exceed the amount sued for, towit, $5,000, provided, that they shall believe from the evidence that the failure to stop the train was either willful, reckless, or capricious on the part of the engineer or other employees."

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Opinion of the court.

The defendant asked the following instruction, and it was by the court refused: "The court instructs the jury, for the defendant, that, even though they may believe from the evidence that the plaintiff signaled train No. 22 on August 1, 1901, and, even though they may believe from the evidence that the engineer saw the signal, or, in the exercise of ordinary care, ought to have seen said signal, yet, if they further believe from the evidence that the engineer's failure to stop said train in accordance with said signal was not due to malice or deliberate design or willfulness or wantonness on the part of the engineer, they may only award the plaintiff such actual pecuniary damage as he may have sustained by reason of said failure to stop said train." The jury found for plaintiff $750.

The action of the court in giving the first instruction and in refusing the second instruction are both assigned as error. It cannot be said that punitive damages will be inflicted because the engineer of the train was in position to see; but, as to whether he did see, or not, is a question of fact for the jury. If the engineer did see the signal to stop, and understood it, and then did not stop, and there is no reasonable explanation as to why he did not stop in obedience to such a signal, growing out of his duties as engineer of a passenger train, then it is a question of fact for the jury, under proper instructions, as to whether his acts were characterized by malice, deliberate design, willfulness, or wantonness. The court gave the instruction for plaintiff that, if they believed the failure to stop the train by the engineer was willful, reckless, or capricious on his part, they might find punitive damages. Then, certainly the defendant was entitled to an instruction that if the engineer did not act maliciously, deliberately, willfully, or wantonly in not stopping the train, they could only find actual damages. We find nothing tenable in the other errors assigned.

For the refusal of the court to give the instruction asked by the defendant, the case is

Reversed and remanded.

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Syllabus.

ELBERT A. WARD v. PENNSYLVANIA FIRE INSURANCE COMPANY.

1. FIRE INSURANCE. *Policy. Stipulation as to time within which to sue. Statute of limitations.*

Where a fire insurance policy provided that suit thereon must be brought, if at all, within a designated time, the provision is valid, and the time is not extended by the statute of limitations.

2. SAME. *Previous suits dismissed. Code* 1892, § 2756.

In such case where suit is brought after the expiration of the contract time it makes no difference that a previous suit, which was dismissed, had been brought within the time, nor is the case aided by code 1892, § 2756, providing that if any action brought within the time limited by the statute of limitations be defeated for matter of form, or the judgment be arrested after verdict for plaintiff, he may bring a new action within a year from the abatement or other determination of the first suit.

3. SAME. *Privilege tax. Code* 1892, § 3401. *Amnesty act. Laws* 1902, *ch.* 55.

In such case a plaintiff who could not recover in a suit begun before the expiration of the contract time, because he had not paid his privilege tax (code 1892, § 3401), and who consequently dismissed his suit, cannot recover in a second suit, begun after the expiration of the time, although he had, before bringing the latter suit, availed himself of the amnesty act (laws 1902, ch. 55), relieving him from the consequences of not having paid the tax.

4. SAME. *Prohibition to sue. Injunction. Code* 1892, § 2758*a*.

In such case a plaintiff is not aided by code 1892, § 2758a, providing that when any person shall be prohibited by law or enjoined from commencing any action, the time during which he shall be so prohibited or enjoined shall not be computed as part of the time limited by the statute of limitations within which suit may be brought.

FROM the circuit court of Noxubee county.
HON. GUION Q. HALL, Judge.

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Statement of the case.

Ward, appellant, was plaintiff in the court below; the insurance company, appellee, was defendant there. The suit was upon a fire insurance policy, given upon a stock of merchandise, and it contained a provision to the effect that a suit could not be maintained upon it, or recovery be had, unless the suit should be brought within twelve months from the time the cause of action accrued. The defense was made that the suit was not begun within the contract limitation of time for its institution. To this defense the plaintiff replied that he had begun a previous suit upon the policy within the twelve months after the cause of action accrued, to which first suit the defendant had pleaded a failure by plaintiff to pay a privilege tax on his store, and plaintiff in consequence was forced to dismiss his first suit, which he did without prejudice, since the plea was true, and, under the statute, the fact pleaded barred a recovery by plaintiff in said suit; that afterwards, on February 19, 1902, the legislature passed an act, commonly called an amnesty act, permitting plaintiff, and all persons similarly situated and embarrassed, under certain penalties, to reinstate himself and giving validity to and making enforceable the contracts which were avoided because of the failure to have paid said tax; that plaintiff had availed himself of said amnesty act, and that the present suit was begun within twelve months thereafter, and as soon as it could have been brought after the removal of the prohibition imposed on plaintiff by law from suing because of a failure to pay said tax. The court below adjudged the replication bad, and plaintiff appealed to the supreme court.

The statutes applicable were laws 1898, p. 25, imposing a privilege tax on stores (code 1892, § 3401), providing, among other things, that "all contracts made with any person who shall violate the provisions of this chapter (meaning the carrying on of any business upon which a privilege tax is imposed without paying the tax) in reference to the business carried on in disregard thereof, shall be null and void so far only as such

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Brief for appellant.

person may base any claim upon them, and a suit shall not be maintainable in favor of any such person on any such contract," and laws 1902, chap. 55, the amnesty act, which provides that all contracts made or entered into previous to the passage of the act and which were void or voidable because of the nonpayment of a privilege tax, should be validated and made of force, if, within ninety days thereafter, the delinquent taxpayer should pay the tax which he ought to have paid, with 200 per cent. damages added thereto.

[That a policy of fire insurance on the stock of goods carried by a merchant in his store is a contract "in reference" to his business, and is void under the statute unless the tax was paid, had previously been decided. *Pollard* v. *Phoenix Etc., Co.*, 63 Miss., 244.]

T. W. Brame, for appellant.

It is true that this court held in the case of *Ghio et al.* v. *Western Assurance Association,* 65 Miss., 532, that the plea set up in defense of that action was good, but there is quite a difference in the contracts. In that case it read: "It is furthermore hereby provided and mutually agreed, that no suit or action against this company for the recovery of any claim, by virtue of this policy, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur, and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

In the policy sued on it reads: "No suit or action on this policy, for the recovery of any claim, shall be maintainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

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Brief for appellee.

Our contention is that Ward was prohibited by law from suing on the policy because he had an insufficient privilege license, and that appellee in the first instance pleaded the same, and that, because of this fact, he was prevented by law and appellee from maintaining his suit, and that, under code 1892, §§ 2756, 2758, he had a right to renew his suit, and our further contention is that, under the broad and sweeping provisions of the act of the legislature enacted February 17, 1902, which declares that all contracts that were void because of nonpayment, etc., shall be and are hereby made valid and of the same force and effect as if there had been no default, etc.

The language here is much stronger than that of the act of March 12, 1886, referred to in *Phoenix Insurance Co.* v. *Pollard,* 63 Miss., 642. There it says "shall become enforceable." Here it says "shall be, and are hereby made, valid and of the same force and effect as if there has been no default."

R. E. Cochran, for appellee.

The provision in the policy that no recovery should be had on it in any court of law or equity, unless suit should be commenced within twelve months from the time the action accrued, is binding and valid. *Ghio & Co.* v. *Western Assurance Association,* 65 Miss., 532, and the authorities therein cited.

Where rights of parties flow from contracts, such rights are unaffected by either general statutory limitations or exceptions. *Riddlebarger* v. *Hartford Life Ins. Co.,* 7 Wall., 386.

The above case was cited and followed in *Harrison* v. *Hartford, Etc., Co.,* 57 Fed. Rep., 299, 301; s.c. 102 Iowa, 115, 116; 71 N. W., 221, 222, holding second suit barred, general statutory provisions not preventing operation of stipulated period; *McElroy* v. *Continental, Etc., Co.,* 48 Kan., 203; 29 Pac., 478, holding statute not conferring rights to commence second suit after stipulated period; *Wilkinson* v. *First, Etc., Co.,* 72 N. Y., 504; 28 Am. Rep., 168, holding statutes saving rights affected by injunction inoperative as against stipulated period;

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Brief for appellee.

Travelers Ins. Co. v. *California Ins. Co.,* 1 N. Dak., 158; 45 N. W., 705; 8 L. R. A., 772, and notes, holding delay due to sickness in bringing action inexcusable; *Hocking* v. *Howard Ins. Co.,* 130 Pa. St., 180; 18 Atl., 615, holding statute relative to bringing second action not extending contract period; *Sample* v. *London, etc. Co.,* 46 S. C., 498; 57 Am. St. Rep., 704; 24 S. E., 337, holding act limiting right to contract, unaffecting existing contract rights; *Guthrie* v. *Connecticut Indemnity Assn.,* 101 Tenn., 648; 49 S. W. 830, holding statutory provision governing dismissed actions not affecting contractural limitation in policy.

A stipulation in the insurance contract requiring actions to be brought within the specified period has reference to actions prosecuted to judgment. A specified period is not extended for purpose of second action, by an action commenced within time, but which fails to be prosecuted to judgment. *Nevitt* v. *John Bacon et al.,* 32 Miss., 212; *Crane et al.* v. *French,* 38 Miss., 503; *Railroad Co.* v. *Orr,* 52 Miss., 541; *Riddlebarger* v. *Hart. Fire Ins. Co.,* 7 Wall., 386, the last case recited and followed in *Harrison* v. *Hartford, Etc., Ins. Co.,* 67 Fed., 300, 302, holding limitation not extended by action prematurely brought and dismissed; *Melson* v. *Phoenix Ins. Co.,* 97 Ga., 724; 25 S. E., 190, holding second action brought too late; *Arthur* v. *Homestead Co.,* 78 N. Y., 468; 34 Am. Rep., 553, holding failure of first suit not justifying commencement of second; *Travelers Ins. Co.* v. *California Ins. Co.,* 1 N. Dak., 157; 45 N. W., 705; 8 L. R. A., 771 and note; *Guthrie* v. *Connecticut Ind. Assn.,* 101 Tenn., 649; 49 S. W., 830, and *McFarland* v. *Aetna, Etc., Co.,* 6 W. Va., 439, all holding second suit not saved by commencement of dismissed action.

The bar of the provision in the contract that suit shall be brought within one year after the action accrued is a vested right and cannot be taken away by any action of the legislature or authority of the court. *Woodman* v. *Fulton,* 47 Miss., 682.

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Opinion of the court.

WHITFIELD, J., delivered the opinion of the court.

The case of *Ghio & Co. et al.* v. *Western Assurance Co. et al.*, 65 Miss., 532; 5 South., 102, is conclusive of the validity of the stipulation in the policy that no suit should be brought except within one year from the time of the loss. The case of *Riddlesberger* v. *Hartford Fire Ins. Co.*, 7 Wall., 326; 19 L. Ed., 257, settles two propositions: First, that where there is a valid contract stipulation as to the time within which suit must be brought, statutory provisions cannot enlarge that time; and, second, that "the specified contract period is not extended for purposes of a second action by an action commenced within time, but which failed to be prosecuted to judgment." In other words, the action which must be brought within the specified contract period is the action which shall afterwards be prosecuted to judgment. See vol. 19 of the Lawyers Edition of the United States Supreme Court Reports, at page 257, for the case *of Riddlesberger* v. *Hartford Fire Ins. Co.*, and page 908 of Rose's notes for the citations of this case in subsequent cases of the United States Supreme Court affirming the two propositions above; these notes of Mr. Rose being incorporated in said volume 19 at end of 7 Wallace as therein reported. Section 2756 of the Annotated Code of 1892 has no application to a contract which fixes its own period of limitation as to time within which a suit may be brought. And section 2758*a* embraces only those cases where a plaintiff is "prohibited by law," etc., "from commencing or prosecuting an action," and, of course, has no application to a case like this, where the plaintiff was not "prohibited by law from commencing or prosecuting his action," but dismissed his suit voluntarily, because he had willfully violated the law himself in not paying the proper privilege tax. To hold the plaintiff entitled to the protection of this section would be to put a premium upon willful violation of law.

Affirmed.

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AMERICAN EXPRESS COMPANY *v.* JAMES L. BRADFORD.

WITNESS. *Depositions. Evidence. Physician. Code* 1892, §1747.

The fact that a witness is a physician, living in another county, having a large practice and whose professional engagements are so much more than ordinarily numerous as to render it likely that he will be unable to attend court, does not authorize the taking of his deposition, under code 1892, § 1747, providing that the deposition may be taken of a witness who is about to depart from the state, or who, by reason of age, sickness or "other cause," shall be unable, or likely to be unable, to attend court.

FROM the circuit court of, second district, Coahoma county.

HON. JAMES H. NEVILLE, Judge.

Bradford, appellee, was plaintiff in the court below; the express company, appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was for the value of a dog, alleged to have been killed by defendant. The deposition of a physician, Dr. Harrison, was taken by plaintiff upon an affidavit averring that he was a material witness in plaintiff's behalf, residing in an adjoining county (Tallahatchie), a practicing physician, having a large practice, whose professional engagements were more than ordinarily numerous, especially during the month of October (the time of the court), and, in consequence, it is likely he will be unable to attend court. A motion was made by defendant to suppress the deposition, but the court below overruled the same and defendant duly excepted.

Cook & Alcorn, for appellant.

The deposition of witness, Dr. W. H. Harrison, should have been suppressed.

The reasons given for the taking of this deposition were not sufficient. (Code 1892, § 1747.)

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Opinion of the court.

John W. Cutrer, for appellee.

Section 1747 of the code of 1892 provides that "Depositions of witness residing, or being, within this state, may be taken in civil causes in the circuit court, when the person whose testimony is required shall be about to depart from the state, or by reason of age, sickness, or other cause, shall be unable or likely to be unable, to attend the court."

Attached to the deposition of the witness, W. H. Harrison, is the affidavit of the attorney for appellee, which, in substance, is that the witness is a material witness for the plaintiff, and that it is necessary to take his deposition because of the fact that he is likely to be unable to be present at the trial of the cause, because of the fact that he is a physician, with a large practice, extending over a large scope of territory, and that his professional engagements are such that it is not likely that he will be able to attend the trial. It was to meet such cases as this that that part of section 1747 of the code of 1892 above quoted was enacted. If the person whose testimony is required is a material witness, and is not likely to be present at the trial for any cause, then his testimony may be taken by deposition.

CALHOON, J., delivered the opinion of the court.

We think the motion to suppress the deposition of Dr. Harrison should have been sustained, for insufficiency of the affidavit required by code 1892, § 1747. That one is a physician in large practice, "and that it is likely that the said witness will be unable to attend trial," etc., does not, in our opinion, bring the instance within the category meant by the words "or other cause" in clause 1 of that statute.

Reversed and remanded.

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Statement of the case.

JESSE E. LELAND v. STATE OF MISSISSIPPI.

CRIMINAL LAWS. *Larceny. Temporary use.*

The taking of property, without the owner's consent, merely for temporary use, without intent to deprive him permanently of his goods, does not constitute larceny of the goods.

FROM the circuit court of Smith county.

HON. JOHN R. ENOCHS, Judge.

Leland, appellant, was indicted, tried and convicted in the court below for the larceny of a horse, and appealed to the supreme court.

The evidence for the state was, in substance, that the horse was stolen or taken from the stable of Tullos, the owner, on the night of January 29, 1902. The defendant was seen at Taylorsville in the morning, and was seen by different parties on the road from Taylorsville to Raleigh, and inquiring the way to Raleigh, which was about seventeen miles north of Taylorsville. He was walking, and about dark he was seen near the house of Tullos. On that night the sheriff's and clerk's offices were broken open and robbed at Raleigh, and the horse was taken from the owner's stable. The next morning Leland was seen at Taylorsville. The horse was also found there, loose; and a bridle and saddle belonging to Tullos were found in a brier heap not far from Taylorsville. Defendant was also seen in Raleigh the night of January 29, 1902. Tullos lived south of Raleigh, on the road that led to Taylorsville. Leland, a stranger in the community, was seen at Taylorsville a few days afterwards, and gave contradictory statements as to where he lived. On this testimony the state rested, and the defendant asked the court to instruct the jury to acquit him, which was

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Brief for appellee.

refused. The first instruction given for the state was as follows: "(1) The court instructs the jury, for the state, that if they believe from the facts and circumstances proved, beyond a reasonable doubt, that on the 29th day of January, 1902, in Smith county, Miss., defendant, Leland, feloniously took and carried away the horse of Tullos, of the value of $100, without said owner's consent, then the jury should find the defendant guilty as charged, without regard to the distance or place to which the defendant carried the horse, or what disposition he made of the horse, or how long said owner was deprived of the use of horse."

McIntosh Brothers, for appellant.

The object of the thief to constitute larceny must be to convert, by the fraudulent taking without the consent of the owner, the title of the property from the owner himself. It makes no difference what disposition the thief may make of the property if he acquires the proceeds of it. This is the theory, "if he takes it from the owner feloniously and without consent of the owner at the same time intending to make what disposition he chooses and intending that owner shall never receive any more benefit from it," then this is larceny. Is this not the doctrine? If so will the court read Instruction 1 given to the state, and see if there is not a manifest error.

J. N. Flowers, assistant attorney general, for appellee.

"The rule is now well settled, that it is not necessary to constitute larceny, that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker; and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property. . . . This rule we consider to be in accordance with the principle on which the law of larceny rests which is to punish the thief for wrongfully and feloniously depriving the owner of his property. The reason of the law is to secure a man's property to him, and

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Opinion of the court.

that is to be carried out, rather by punishing the theif for feloniously depriving him of it, than for the wrongful gain he has made by the theft." *Hamilton* v. *State,* 35 Miss., 219; followed in *Warden* v. *State,* 60 Miss., 638; *Delk* v. *State,* 64 Miss., 77.

CALHOON, J., delivered the opinion of the court.

We should, perhaps, not disturb the verdict of the jury if the issue merely was whether Leland took the horse from the stable. But the question, further, is whether he took it for temporary use, to ride, or to deprive the owner permanently of his property. The evidence very strongly supports the probability of the taking being merely for transportation from Raleigh to Taylorsville. In this view, the first instruction given for the state was misleading and erroneous, and not cured by any instruction for the defense, if, indeed, it could be cured. *Beatty* v. *State,* 61 Miss., 18; *Hamilton* v. *State,* 35 Miss., 214-219; *Warden* v. *State,* 60 Miss., 639; *Delk* v. *State,* 64 Miss., 77; 1 South, 9; 60 Am. Rep., 46; *People* v. *Miller,* 88 Am. St. Rep., 601, note; A. & E. Enc. Law, vol. 1, p. 761 (1st ed.).

Reversed and remanded.

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Brief for appellant.

WINT ADAMS, STATE REVENUE AGENT, v. JOHN B. DENDY.

1. SUPERVISORS. *Salary. Local act. Laws* 1890, *p.* 386. *Repeal by general act. Code* 1892, § 8.

Laws 1890, p. 386, ch. 250, sec. 8, authorizing a salary to members of the board of supervisors of Madison county, was not repealed by code 1892, which reproduces the general, but not the local, provisions of such act, as § 8 of the code preserves all private and local laws unless repeal or modification be "expressly so provided."

2. SAME. *Constitution of* 1890.

Constitution 1890, being prospective, does not affect such act, it being in force at the time of the adoption of the constitution.

FROM the circuit court of Madison county.

HON. ROBERT POWELL, Judge.

Adams, state revenue agent, appellant, was plaintiff in the court below; Dendy, appellee, was defendant there. From a judgment sustaining a demurrer to the declaration and dismissing the suit plaintiff appealed to the supreme court. The opinion states the facts.

Mayes & Harris and *H. B. Greaves,* for appellant.

First. Was section 8 of chapter 250 of the laws of 1890 repealed by the enactment of the code of 1892, or was it not?

Second. If the said section was not so repealed, is it not unconstitutional?

We affirm that the section was repealed by the code of 1892. We are aware that in this proposition we come squarely in conflict with the decision of this court in the case of *Madison County* v. *Collier,* 79 Miss., 220.

In that case, we submit that the court, while the logic and reasoning of its opinion was correct, yet proceeded upon an erroneous assumption of fact. The opinion runs as follows:

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Brief for appellant.

"The contention of the county is based upon the idea that chapter 250 of the acts of 1890 is repealed by the code of 1892. Chapter 250, acts of 1890, seems to be an amendment to chapter 320 acts 1884 for working public roads in Madison county by contract; and, as it was held in *Madison County* v. *Stewart,* 74 Miss., 160, that the later act was not repealed by the code of 1892, it seems to us that it must follow that chapter 250 acts 1890, is not repealed by the code."

We cannot challenge the logic of this position, if it be true that the act now in question was nothing but an amendment of the act of 1884; and if it be further true that the act of 1884 was not repealed by the code of 1892, then it must follow that the amendatory act was not repealed. Neither do we question the soundness of the decision in the case of *Madison County* v. *Stewart,* 74 Miss., 160. It is not necessary to take such a position in this case. For the purpose of this case, we shall admit the soundness of that decision.

What we do contend for here, and the point which we desire to press upon the attention of the court, is this—that the act of 1890 was not "an amendment of the act of 1884," but was an amendment of the code of 1880; and that, while the act of 1884 may not have been repealed by the code of 1892, the act of 1890 being an amendment of the code of 1880 was repealed by the code of 1892.

The course of reasoning which leads to the conclusion, and may lead to it correctly, announced in the Stewart case in 74 Miss., as applied to the act of 1884, will not properly lead to the same conclusion as applied to the act of 1890. The two statutes are of very dissimilar character, and deal with essentially different subjects, although both have reference to the public road system.

The act of 1884 was strictly and unmistakably a local law, not purporting to have any application except to Madison county, or even appearing to do so.

The act of 1890, however, is one of somewhat more doubtful

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Brief for appellant.

character. It must be admitted that it is very badly drawn. It seems to be a jumble of sections, which, considered separately, would appear to be general amendments to the code of 1880, applicable to every county in the state, and of other sections which are clearly and avowedly local to Madison county alone.

It is a little difficult to classify the thing. It seems to be in part general legislation, and in part local legislation; but whether general or local it is certainly not an amendment to the act of 1884. It does not even profess to be an amendment to that act, and the act of 1884 is nowhere alluded to in it directly or indirectly, and the two statutes deal with entirely different matters connected with the road law.

The act of 1884 deals, and deals only, with the matter of authorizing the public roads in Madison county to be worked by contract, while the act of 1890 does not touch that subject at all, but deals only with the two subjects of the inspection of the public roads by members of the board of supervisors and reports to be made of such inspection, on the one hand, and the ways and means of laying out and condemning new public roads and paying damages therefor, on the other.

How can it be possible that the act of 1890 is an amendment only to the act of 1884, when it does not profess to be such, and does not allude to it, and does not deal anywhere with the same subject matter; and also when it does not profess to be, as it is and only can be, an amendment to certain sections of the code of 1880, which sections in the code of 1880, are not touched by the act of 1884 at all.

It must be that the code of 1892 repealed section 8 of the act of 1890, else the law is unconstitutional.

Section 91 of the constitution of 1890 provides as follows:

"Sec. 91. The legislature shall not enact any law for one or more counties, not applicable to all the counties in the state, increasing the uniform charge for the registration of deeds or regulating costs and charges and fees of officers."

Section 88 of the constitution also provides as follows:

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Brief for appellee.

"Sec. 88. The legislature shall pass general laws, under which local and private interests shall be provided for and protected," etc.

We are not obvious of the rule of constitutional construction by which it is settled that where a new constitution prohibits local or special legislation, such prohibition is considered to be prospective in its character and not to repeal existing private or local statutes unless they are distinctly in conflict with the positive and self-executing provisions of the constitution elsewhere found. Nor have we overlooked the decision of this court in the case of *Lum* v. *Vicksburg,* 72 Miss., 950.

Perhaps the proposition which we have to submit would be better stated if it were put, not as a question of the unconstitutionality of the statute itself, but as a question of the bearing of the constitution of 1890 on the true interpretation and meaning of the code of 1892. Exactly stated, our point is this: That while, under the ordinary rule of construction alluded to above, if the question stood only on the fact that the constitution of 1890 was adopted after the passage of the act of 1890, and if it were only a question of the effect of the constitution itself on that act, it would be settled by the authorities bearing on the subject that the constitution would not repeal the act of 1890.

Yet, the further and controlling fact is found to exist in the case at bar that, after the adoption of the constitution of 1890, the code of 1892 was itself adopted.

Grant that the constitution of 1890 would not repeal the act of 1890, is it not clear that the enactment of the code of 1892 after the adoption of the constitution of 1890 did repeal the act of 1890?

J. A. P. Campbell, for appellee.

That the act of 1890 (acts, p. 384), was a local and special act for Madison county, as to several of its sections, and particularly as to section 8, is undeniable, and whether amendatory of the act of 1884 or not is immaterial. That it is, as to certain sec-

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Brief for appellee.

tions, local and special, is all that is necessary to completely vindicate the opinion of this court in *Madison County* v. *Collier,* 79 Miss., 220, holding that it was not repealed, on the principle on which it was held in *Madison County* v. *Stewart,* 74 Miss., 160, that the act of 1884 was not repealed by the code of 1892.

Appellee plants himself on the impregnable ground furnished by that canon for the interpretation and application of constitutions and statutes expressed by the maxim, *Generalia specialibus non dorogant,* illustrated by ten thousand cases, among them, the decisions of this court now assailed.

True, the decision reported in 74 Miss. is acquiesced in by counsel but a vain effort is made to distinguish the two cases which rest on the very same principle.

The act of 1890 was unquestionably an amendment of the act of 1884, even though not so declared. That was plainly its effect. Mr. Mayes said it was an amendment of the code of 1880. It was both, and he concedes if it was amandatory of the act of 1884, it was not repealed. That gives up the case.

The act of 1890 as to Madison county was the complement of the act of 1884. As to this there can surely be no dispute.

Being a local and special act, it was by the express provision of the code of 1892, section 8, not repealed by it. Section 3 of the code relates to general acts, and has no reference to local and special acts.

The constitution was prospective and it did not amend the Madison laws.

The constitution and code are separate and distinct things. The constitution stands alone, and is wholly independent. The code depends on it, and must conform to it, but the idea of joint operation is incomprehensible. The fundamental law is the authority for statutes, the criterion and test of their validity, but the idea that you may piece them together, and by combination effect what neither alone does, is, we venture to assert, unheard of before. They have different purposes and operation, always separate. The code is valid or not as it conforms to the consti-

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Opinion of the court.

tution or not. The code is dependent on the constitution, but not *vice versa*. It is a pure fancy that a result can come partly from both.

J. B. Chrisman, on same side.

Argued orally by *Edward Mayes,* for appellant, and by *E. A. Howell* and *J. A. P. Campbell,* for appellee.

CALHOON, J., delivered the opinion of the court.

Mr. Dendy has been for years a member of the board of supervisors of Madison county. The revenue agent sued him, and the sureties on his official bond, to recover money collected by him as salary, under section 8 of chapter 250, acts 1890, p. 386, approved January 31, 1890. A demurrer to the declaration was sustained, and the revenue agent appeals. That section of that act distinctly authorizes the salary as to the particular county of Madison, and, if valid as a local measure, settles this controversy in favor of Mr. Dendy. It was held valid by us in *Madison County* v. *Collier,* 79 Miss., 220; 30 South., 610, which decision is here attacked.

The questions presented by counsel for appellant are whether this section 8 is repealed by the general law of the code of 1892 (§§ 3914, 3928, 3935), and, if not, is it constitutional? It was undisputably valid on November 1, 1890, the date on which our present constitution was adopted; and it seems clear that that instrument did not, of itself, affect its validity in its aspect as a special statute for Madison county. The code of 1892, of itself, did not repeal it, as this court has held specifically, on precisely the same issue as here presented, in *Madison County* v. *Collier,* 79 Miss., 220; 30 South., 610, the opinion in which is based on the authority of *Madison County* v. *Stewart,* 74 Miss., 160; 20 South., 857, construing a kindred statute for the same county (acts 1884, p. 318, ch. 320) holding the same way. The residuum, then, for contest, is that, granting that the constitution of 1890, alone, did not affect section 8 of the acts of 1890,

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and granted that the code of 1892, alone, and without that constitution behind it, did not affect that section, may it not still be true that both together did?

By acts 1884, p. 318, ch. 320, the Madison county board of supervisors was empowered to work the roads by contract for not less than one year, nor more than five years, to be let privately or publicly. The contract, in a concrete case then before this court, was made in 1895, after the constitution of 1890 and code of 1892, which code, § 3929, in a general law for all counties, limited such contracts to not less than two years, and provided by section 340 that all contracts over $50 be let at public outcry. The radical difference here, as well as other differences not necessary to note, is immediately and plainly apparent. Now, under this local act of 1884, the contractor sued the county—the defense being *ultra vires,* on the ground that the general law of the code repealed the local act; but this court, through Chief Justice Cooper, sustained the contract and repudiated the idea of code repeal. The court held that, without regard to section 8 of the code of 1892, which provides that local laws "not revised and brought into" that code are not affected by its adoption "unless it be expressly so provided herein"; the local act was not repealed. The opinion has this language: "That act (1884) was of local operation only. It provided a complete and detailed scheme, having reference to the highways in one county, while the code provisions applied equality to all the counties in the state. The repeal of statutes by implication is not assumed to have been within the contemplation of the lawmakers, and when one statute is particular, and the later one general, and especially where the later statute contains no negative words, the rule of construction is well settled that the prior statute is not thereby repealed, unless the repugnancy be so great as to show clearly the legislative purposes to that effect." This language is pertinent to constitutions as well as statutes, and just as sound as applied to the act of 1890, now before us, as to the act of 1884. In this connection we desire to refer to

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the case of *Rogers* v. *United States,* 185 U. S., 83; 22 Sup. Ct., 582; 46 L. Ed., 816, in which it is held that, "where the intent is a debatable question," the special statute stands, under rules guiding the courts in construction; and Mr. Justice Brewer, in that case, in delivering the opinion of the court, says: "Where there are two statutes, the earlier special and later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

The act of 1890, now immediately before us, is entitled "An act to insure the better working of the public roads in the county of Madison, and for other purposes." When the act was passed it was entirely competent for the legislature to pass acts partly general and partly special. This is that sort of an act. Its sections 3, 5, 7 and 8 are purely local, having reference to Madison county only, while the other sections are express amendments to the code of 1880, and embrace the whole state. But those sections which are special are none the less so because others are general, and we sustained them as still in force, and not affected by the code of 1892, in *Madison County* v. *Collier,* 79 Miss., 220; 30 South., 610, in which we upheld Mr. Collier's claim, which was precisely the same as Mr. Dendy's in the case in hand. We think it plain that the local sections of the act of 1890 are designed to be, as they are in fact, amendments to the act of 1884, if this be material, as we do not think it is. It was not the purpose in the code of 1892 to repeal the act of 1890, or it would have been so stated, as section 8 of that code preserves all private and local laws unless repeal or modification be "expressly so provided." The constitution of 1890, being prospective, does not affect the statute, and we cannot see that sections 88, 90, and 91 of that instrument affect the question be-

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Statement of the case.

fore us. Very manifestly, section 91 is on a wholly different subject. Because the code of 1892 reproduces the general provisions of the act of 1890, and does not incorporate the local provisions, does not establish the corallary that it thereby repealed the special provisions for Madison county. The inference is the reverse, since it was not expressly done. The act of 1890 being valid when the constitution of 1890 was adopted, and being unaffected by it, and being unaffected by the code of 1892, and not having been interfered with by the legislature since the decision in the Stewart case and the Collier case, is still in force.

Affirmed.

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WILLARD E. SHAW ET AL. *v.* JESSE E. WOFFARD ET AL.

STOCK LAW DISTRICT. *Laws* 1900, *p.* 164, *ch.* 124. *Board of supervisors Enlarging districts.*

Under laws 1900, ch. 124 (Laws, p. 164), empowering them so to do, the board of supervisors may create a stock law district less in area than a township, if the territory thereof be adjoining and contiguous to a pre-existing district in the same or an adjoining county.

FROM the circuit court of Webster county.

HON. WILLIAM F. STEVENS, Judge.

Woffard and others, appellees, petitioned the board of supervisors to add territory, less than a township, to a pre-existing stock law district; Shaw and others, appellants, opposed.

An appeal was had from the board of supervisors of the county to the circuit court, where a judgment was rendered granting the prayer of the petition, from which judgment Shaw and others, opposing the petition, appealed to the supreme court. The facts are stated in the opinion of the court.

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Opinion of the court.

Samuel Cook, for appellants.

This proposed district is condemned by its shape, and, if formed thus, it would not be permitted to stand. *Gore* v. *Doolittle,* 77 Miss., 620. The west boundary line, splitting sections into two parts, and the east boundary, running zigzag through the neighborhood, strongly indicates "Something rotten in Denmark."

By a correct diagram, according to description in petition, it will be seen that the west boundary line is diagonal and the north boundary line is in Chickasaw county by forty rods, or one-eighth of a mile.

All the power of the board of supervisors, legislative, judicial, and ministerial, is limited to their own county. Code of 1892, §§ 272, 289; acts of 1896, ch. 132, p. 145; constitution of 1890, sec. 170.

Roane & Lamb and *Dunn & Gould,* for appellees.

The case of *Gore* v. *Doolittle,* 77 Miss., and *Garner* v. *Webster County,* 79 Miss., do not apply in this case, for the reason that these petitioners only desire to add to the stock law district already created by the legislature of 1890; they do not desire to make a new stock law district. See acts 1900, ch. 124.

It is not necessary under the law of 1900 that the land sought to be added to a valid stock law district already made should lie in any particular shape, or be composed of any certain number of acres, the only requisite being that it shall be done in part of a county and adjacent to the stock law district already created, to which petitioners desire to attach their land, and also that it be done upon "like proceedings"—that is, by petition from two-thirds of the "resident freeholders and leaseholders for a term of three or more years" of the land sought to be added.

PRICE, J., delivered the opinion of the court.

On the first Monday of February, 1902, the appellees pre-

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sented their petition to the board of supervisors of Webster county, praying that certain lands in said county, described as follows: "Beginning at a line between Chickasaw and Webster counties, at the northwest corner of the northeast quarter of sec. 34, twp. 15, range 1 east, and running south to the southwest corner of sec. 5, twp. 21, range 11 east, in Webster county; thence east four miles to the southeast corner of the southeast quarter sec. 2, twp. 21, range 11 east; thence north one mile to the northeast corner of the northeast quarter of sec. 2, twp. 21, range 11 east; thence west along the section line between said section 2 and fractional sec. 5, twp. 16, range 2, to the southwest corner of said fractional section 5; thence north along the section line between fractional secs. 5, 6, twp. 16, range 2 east, to the south boundary line of sec. 32, twp. 15, range 2 east; thence west to the southeast corner of sec. 31, twp. 15, range 2 east; thence north along section line to Chickasaw county line; thence west along the section line to point of beginning, and adjoining and contiguous to the said county of Chickasaw and the stock law district as established by the acts of the legislature of 1890, p. 170"—be established as a stock law district. The petition and proof show that more than two-thirds of the resident freeholders and leaseholders, for a term of more than three years, signed the petition; that the territory described in the petition was adjoining and contiguous to that part of Chickasaw county then under the stock law. It is also alleged that the proposed territory, excepting the following land (the west half and the east half of the northeast quarter sec. 2, twp. 21, range 11 east), has heretofore been treated as being under full stock law, but, "owing to a defective order of the board of supervisors, or otherwise," the said territory was thrown out of the stock law district, and that the farmers in the proposed territory have no fences, except for pastures, and a portion of their oat crop has already been planted. W. E. Shaw and others appeared at the February, 1902, meeting of the board, and filed an an-

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swer opposing this petition, and introduced, over petitioners' objections, and along with other evidence, the following preamble and resolution: "Whereas, the people of Webster county are being constantly harrassed by the question of stock law, wherefore, by the people, in mass meeting assembled, Resolved, that from and after the 3d day of February, 1902, all petitions asking for a stock law are illegal, and that a bill of exceptions is taken, if granted, to test the legality thereof." This mass meeting also appointed a committee of fifteen men (three from each supervisor's district) in Webster county.

The substantial averments of the petition were proven. The board of supervisors, after hearing the petition, on February 6, 1902, granted the petition, and put the stock law in force at once as to all territory embraced in the petition, with the exception of the west half and the east half of the northeast quarter sec. 2, twp. 21, range 11 east; and, as to this excepted tract the petition was granted, to take effect at the expiration of four months. The citizens' committee filed their bill of exceptions, and the case was appealed to the circuit court, and there the learned judge affirmed the findings of the board of supervisors, and from such judgment Shaw and others appeal to this court.

There are two propositions presented by this appeal: First, it is contended that the shape of the district is not according to law; second, that the board of supervisors of Webster county undertook to exercise jurisdiction over a portion of the lands lying in Chickasaw county; and appellees rely upon *Gore* v. *Doolittle,* 77 Miss., 620; 27 South., 997, and *Garner* v. *Webster County,* 79 Miss., 565; 31 South., 210. In *Gore* v. *Doolittle,* this court held that sec. 2056 of the code of 1892, as amended (laws 1894, p. 48, ch. 58; laws 1897, p. 21, ch. 17), provided that the enforcement of a stock law in a part of a county does not authorize a stock law district, without natural boundaries, to be laid out with great irregularity, and so as to include those persons who favor the

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law and exclude those persons who oppose it, and, unless such proposed district be marked by natural boundaries, it should be formed of entire sections of land, and should comprise a compact body, embracing at least thirty-six square miles. In *Garner* v. *Webster County,* this court held "that where the record of the proceedings of the board of supervisors, undertaking to establish a stock law district in a part of a county, shows that the proposed district was shaped contrary to the statute, the proceeding is absolutely void and subject to collateral attack." But it will be borne in mind that these decisions were had under section 2056 of the code of 1892, as amended by the acts of the legislature of 1894 and 1897. So the act of the legislature of 1900, p. 164, ch. 124, was passed to meet the conditions made necessary by the decisions of this court in the cases cited. This condition of affairs worked a hardship on those people living adjoining and contiguous to districts formed according to law, both where the district lay within the county and within an adjoining county where the stock law was in force. By the act of 1900, p. 164, ch. 124, the legislature made it possible for the people so situated to be annexed to a stock law district already formed, whether such district was in that or an adjoining county. By the language of the statute, it expressly applies to territory lying "within a county contiguous to an existing stock law district of another county." So that where a proposed stock law district is adjoining and contiguous to an existing stock law district in the same county, or where such proposed district is adjoining or contiguous to a stock law district of an adjoining county, the petitioners have the right, upon complying with the acts of 1900, to be declared a stock law district; and this is true regardless of whether the proposed district embraces a township, or a less quantity of land.

It is perfectly manifest that when parties petition for a stock law district in a county where no district now exists, and where not contiguous to a stock law district in another county, such application should contain a township, or sufficient land,

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Syllabus.

in the aggregate, to amount to thirty-six square miles, whether taken from two or more townships, or such territory as is separated by natural boundaries. The language of the statute is: "Any part of a county, whether less than a township or not, may [interpreted 'shall'] be added to any stock law district heretofore or hereafter established, whether in the same or adjoining county. But the order declaring a stock law shall not take effect, nor be put in force, for four months after it has been entered on the minutes of the board; provided, that territory which has heretofore been treated as being in the stock law, but which, on account of a defective order of the board, or otherwise, was not legally embraced in such stock law territory, shall be allowed to come into the stock law immediately after the order has been entered." And the conclusions reached make a consideration of the second proposition advanced unnecessary.

Affirmed.

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YAZOO CITY *v.* HENRY B. LIGHTCAP.

1. CONSTITUTIONAL LAW. *Municipal charters. Constitution* 1890, *sec.* 88.
Constitution 1890, sec. 88, providing that the legislature shall pass general laws under which cities and towns may be chartered and their charters amended, merely requires the passage of uniform general laws prescribing the mode by which such charters may be granted and amended, and does not require that such laws shall contain the entire contents of charters and amendments.

2. SAME. *Code* 1892, § 3039. *Laws* 1900, *p.* 79, *ch.* 69.
Code 1892, § 3039, as amended, laws 1900, p. 79, ch. 69, authorizing the amendment of the charters of municipalities which have not adopted the code chapter on "municipalities," and allowing amendments inconsistent with said code chapter, is not violative of constitution 1890, sec. 88, requiring the passage of general laws under which cities and towns may be chartered and their charters amended.

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Statement of the case.

3. SAME. *Delegation of legislative power.*

Laws 1900, p. 79, ch. 69, amending code 1892, § 3039, so as to authorize amendments to charters of municipalities not operating under the code chapter on "municipalities" is not unconstitutional as delegating the exercise of legislative power.

4. MUNICIPAL BONDS. *Election. Joint purposes. Code* 1892, §§ 3014, 3016, 3017.

A municipality may order an election under code 1892, § 3014, *et seq.*, submitting to the voters as a single proposition the issuance of bonds for two or more purposes.

FROM the chancery court of Yazoo county.

HON. HENRY C. CONN, Chancellor.

Lightcap, the appellee, was complainant in the court below, and Yazoo City, appellant, was defendant there. The object of the suit was to enjoin the issuance of municipal bonds. From a decree in complainant's favor the defendant appealed to the supreme court.

The city of Yazoo had a charter granted it before the code chapter on "Municipalities" (code 1892) was adopted, and did not come under that chapter. It amended its charter in 1901 and 1902, in pursuance of section 3039 of the code of 1892, and the amendment thereof in 1900 (acts 1900, p. 79, ch. 69). These amendments to the charter consisted in the adoption of sections 3014, 3015, 3016 and 3017 of the code, except the restrictive clause of section 3014, as to the amount of indebtedness it might incur. Under these amendments it proceeded to issue bonds for proper municipal purposes, when Lightcap filed a bill in the chancery court, enjoining it from so doing. The ground alleged in the bill is that the amendments were illegal and ineffectual, because section 3039 of the code, and the act of 1900 amending it, are unconstitutional and void. The bill admits that the charter was amended in strict compliance with the statute, and that the proceedings for the bond issue was in exact conformity to the charter as amended, except that complaint is made that there is no separation of the purpose for which the bonds were to be issued. This bill

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Brief for appellant.

admits that the amount of bonds proposed to be issued is below the limit prescribed by section 3014.

J. A. P. Campbell, for appellant.*

Yazoo City had a charter granted by the legislature in 1884. That was before the provision for chartering municipalities otherwise than by act of legislature in each case, which was made by the code of 1892. Yazoo City did not come under the municipal chapter of that code, and, in 1901 and 1902, it amended its charter, in pursuance of section 3039 of the code, and the amendment of that section in 1900 (acts 1900, p. 79, ch. 69), by adopting as part of its charter sections 3014-3017 of the code, except the restrictive clause of section 3014 as to the amount of indebtedness it might incur. Having amended its charter, it proceeded to issue bonds for proper municipal purposes, when it was enjoined by the appellee on the ground that the amendment of its charter was illegal and ineffective, because section 3039 of the code and the act of 1900 amending it are unconstitutional and void. The bill admits that the charter was amended in strict conformity to these statutes, and that the procedure for the issuance of the bonds was in exact conformity to the amended charter, except that some complaint is made of a want of separation of the purposes for which the bonds were to be issued. While the restriction of section 3014 of the code as to the amount of indebtedness the city may incur was not included in the amendment, the bill admits that the amount of bonds proposed to be now issued is below the limit prescribed by that section. It is thus seen that the question presented by the bill, which was demurred to by Yazoo City, is as to the constitutionality of section 3039 of the code and its amendment by act of March 12, 1900 (acts 1900, p. 79, ch. 69). By section 3039, then existing municipalities, which did not come under the chapter of which the section is a part, were authorized to amend their

* The briefs in this case are published in full by order of the court.

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charter, as it provides, consistently with the constitution and laws of the United States and this state, including the chapter of which section 3039 is the last. By it any amendment was required to consist with that code chapter. By the amendment of March 12, 1900, the amendment of its charter by a municipality need not consist with chapter 93 of the code, and is not expressly required to conform to the laws of the state, other than chapter 93 of the code, but that is probably implied. But no question of that sort is here involved, since the amendment of its charter by Yazoo City was not inconsistent with any law of the state. Indeed, the amendment of the charter of Yazoo City was not inconsistent with chapter 93 of the code, but consistent with it. The restrictive part of section 3014 was not embraced in the amendment, but the restriction was not disregarded in issuing the bonds. As the action of Yazoo City, which is assailed by this bill, is not inconsistent with chapter 93 of the code, but in strict conformity to it, as to issuance of bonds, the case may be said to rest on section 3039 of the code, independently of the amendatory act of March 12, 1900, if there is any constitutional objection to the latter which does not apply to the former, though I do not think there is. The bill avers that neither section 3039 of the code, nor the amendatory act of 1900, was referred to the committee on local and private legislation. A reference to section 89 of the constitution, with reference to which this averment is made, will at once show the frivolous nature of this assailment of these laws, which bear no resemblance to the local and private legislation contemplated by it. The real ground of the attack on section 3039 of the code and its amendment is that it was not competent for the legislature to confer on local agencies (municipalities) the power to amend their charters; that this is a delegation of legislative power, which can be exercised by the legislature alone, and cannot be delegated.

There has been a vast amount of judicial discussion on the subject, and nowhere an abler one than in *Alcorn* v. *Hamer*,

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Brief for appellant.

38 Miss., 652, where may be found all that is worth reading on the subject, taking the arguments of counsel and opinion of the court. There is no dispute of the general proposition that all legislative power is vested in the legislature, and that it cannot abdicate its appropriate function, but it is equally true that the grant to the legislature of full legislative power includes the power of committing to local agencies the power to do for the legislature what it might do. Cooley says: "The maxim that legislative power must not be delegated is to be understood in the light of the immemorial practice of this country and England, which has always recognized the policy and propriety of vesting in the municipal organization certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than central authority." Cooley, Const. Lim., p. 140, note 118. Again he says: "The right of the legislature, in the entire absence of authorization or prohibition, to create towns, etc., and confer on them the right of local government, and especially of local taxation and police regulations usual with such corporations, would always pass unchallenged." *Ib.*, pp. 228, 229, note 191. Thompson on Corporations, Vol. 1, sec. 36, says: "In the absence of constitutional restraints, no reason is perceived for holding that the legislature cannot delegate to subordinate agencies the power of creating corporations, prescribing the manner in which the power shall be exercised." I could multiply citations and quotations to the same effect, but it is needless.

Constitutions are framed with full view of existing systems and prevailing conditions, and are to be interpreted accordingly. In all the states of the United States, one of the most prominent features of government is the practice of committing to local agencies the power of local government, and perhaps nowhere has this feature been more prominent and this practice more constant than in Mississippi. From an early day the practice has been, in this state, to delegate power as

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Brief for appellant.

to matters of local concern to those directly interested, and such exercise of power has always been sustained when questioned. *Williams* v. *Cammack,* 27 Miss., 221; 61 Am. Dec., 508; *Alcorn* v. *Hamer,* 38 Miss., 652; *Barnes* v. *Pike Co.,* 51 Miss., 305; *Schulherr* v. *Bordeaux,* 64 Miss., 59; 8 South., 201; *Lum* v. *Vicksburg,* 72 Miss., 950; 18 South, 476. Municipal and other corporations were created, or authorized, and armed with power to legislate as to their internal affairs and local concerns. Ordinances and bylaws are but legislative acts performed by authority conferred by the legislature. Every corporation must have power to legislate. That is essential to its existence. Every ordinance or bylaw is a law of a limited nature, but still a law; and, therefore, every law creating, or authorizing the creation of, a corporation, may be said to be a delegation by the legislature of power to legislate, but none is so reckless as to assert that such delegation by the legislature is unconstitutional. Consider the great number and variety of agencies, besides municipalities, existing in this state, and exercising the delegated power to effect the purpose of their organization.

The code of 1857, ch. 35, prepared, under the constitution of 1832, by three great lawyers, provided for the creation of corporations by act of the persons desiring incorporation, who were to prepare a charter drawn up on parchment or paper, to contain, among other things, "the powers to be exercised," and, upon its approval by the governor, it was to be effective. This includes cities and towns. There was no general incorporation act to be adopted, but the broad power was conferred to "state the powers to be exercised." In other words, the incorporators prepared the charter to suit themselves. The validity of that act was never questioned. It was re-enacted, with some change as to the corporations which might be formed under the constitution of 1869, and is contained in the codes of 1871 and 1880. It was enlarged and extended after the code of 1880, and was in full operation when the constitution of

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Brief for appellant.

1890 was adopted. The framers of the constitution of 1890, familiar with the previous history of legislation in the state, and existing conditions, adopted sections 87 and 88, giving the sanction of the sovereign will to the established practice of the state in the long past, and commanding its continuance and extension. Section 88 commands the enactment of general laws "under which cities and towns may be chartered and their charters amended." There is no indication of how this shall be done. That is left entirely to the legislature. Its discretion is unlimited as to the manner. It may be justly assumed that the framers of the constitution had in view the provisions of the code of 1857 and subsequent codes on the subject. Under the command of the constitution, there surely cannot be a doubt of the power of the legislature, in the exercise of its discretion in obeying, to determine how charters may be formed and amended. And, if the narrow view held by the chancellor—that only municipalities chartered under general laws are embraced in the language of the section—be correct, surely the emphatic command as to them may be regarded as at least a permit to the legislature to confer such power on all municipalities. It settled the policy of the state; gave the sanction of the sovereign will to the delegation of power to local bodies to adopt charters of their own preparation, and to change them. It would be absurd to have corporations able to adopt and amend their charters, and others of the same nature, without this right. No such purpose can be imputed to the framers of the constitution. The fundamental law is to be interpreted as outlining government—making a foundation to be built upon—and is not to be narrowly interpreted. There should be no sticking in the letter *"Qui haeret in litera, haeret in cortice."* It was competent for the legislature to merely follow the code of 1857 and subsequent codes as to how corporations should be created under general laws, and it did in the code of 1892, except that it adopted a chapter on "Municipalities," which, while entirely proper, was not necessary. As to other corpora-

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tions, the code of 1892 followed former codes, and excluded railroad and insurance companies, for which other provision was made. As to all other corporations, not municipal, the code of 1892, following former codes, confers power to state in the charter "the powers to be exercised," and power to amend is given. It is just as much the right of the legislature to allow the incorporators of municipalities to frame charters, and state the powers to be exercised, as in case of other corporations. And in conferring power on municipalities to amend their charters, necessarily they are to frame the amendment.

There has been much nonsense about the inadmissibility of the legislature delegating power. The courts invented the doctrine that, while a mere legislative proposition to make a law could not become one by the vote of the people, a complete legisative act might be made to operate, or not, as the people designated might say yea or nay in some prescribed way. This, although the recognized doctrine, is a rather thin distinction, and really sprang from the necessity of practical legislation to carry out the American idea and practice of local government. The maxim that legislative power cannot be delegated has been disregarded and violated universally, were it understood to prohibit delegation to corporations and localities of the power to act as to their internal affairs and local interests. Such a doctrine is revolutionary and destructive, and utterly inadmissible. The municipal chapter of the code, including section 3039 and its amendments, would have been valid if the constitution of 1890 did not exist; and a *fortiori,* in view of that, is the validity of the legislation assailed beyond any question or doubt. Therefore, the decree should be reversed and the bill dismissed.

The mention in the bill of the fact that the bonds were declared to be issued for the purpose of sewerage, waterworks, and electric lights, without giving voters opportunity to vote on the objects separately, seems to cut no figure in the case; and surely, since no law required separation, the town council

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must be allowed the right to propose bonds for the allied objects, as was done. Any voter could vote against the proposition as a whole, and thus object to each part. Doubtless the town council was not willing to issue bonds for one of the improvements without including all, and hence the proposal.

Henry & Barbour, on same side.

This is a most important case, both in the amount and the principle involved. The corporation of Yazoo City declined to come under the provisions of chapter 93 of the code of 1892, known as the "Chapter on Municipalities," but preferred to remain under her own charter, and make such amendments thereto, under section 3039 of the code of 1892, and subsequent acts of the legislature, as she might deem wise and proper. It has been her desire for months to begin the erection of a modern, up to date waterworks, electric light, and sewerage system, but thus far every obstacle possible has prevented the consummation of this purpose, the same being placed by the owners, resident mainly in New York and Michigan, of the present inefficient, unhealthy, and broken-down waterworks plant, or, rather, an excuse for a plant. A determination of the question as to whether Yazoo City shall be permitted to put in waterworks, electric light, and sewerage system commensurate with the needs of the city, is now before this court for final adjudication.

The proposed issue of bonds has been attacked as absolutely void on the following grounds, to wit: (1) The amendments to the charter of Yazoo City, ordained November 15, 1901, and September 8, 1902, respectively, are not consistent with section 3039 of the code of 1892; but, if consistent, (2) section 3039 of said code is unconstitutional, and the act of the legislature of 1900, entitled "An act to amend section 3039 of the annotated code of 1892, with reference to amending charters of municipalities," approved March 12, 1900, p. 79, sec. 66, ch. 10, of the charter of Yazoo City, approved March

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Brief for appellant.

charter of Yazoo City purport to be enacted thereunder, and their validity cannot be sustained by either or both; (3) section 66, ch. 10, of the charter of Yazoo City, approved March 15, 1884 (laws 1884, p. 596, sec. 405), has been disregarded, and not observed in any particular, in providing for the sale and issuance of said bonds as proposed by said ordinance heretofore referred to; (4) if the proceedings of the board leading to the proposed sale of said bonds were otherwise legal and regular, said proposed sale is void, for the reason that the taxpayers and voters are not given the opportunity to either protest or vote against or for the issuance of said bonds for the several objects for which they are proposed to be issued—said proposed issue of bonds combining three separate and distinct objects, which should have been submitted separately.

It will be observed, in passing, that fundamental and well-recognized rules and requirements have not been observed in setting forth the reasons as to why section 3039 of the code is unconstitutional, and as to why the act of the legislature of 1900 amending said section is unconstitutional, the pleader failing to set forth with particularity in what respect it is unconstitutional and with what provisions of the constitution it is at conflict. *State* v. *Fourcade* (Ala.), 13 South., 187; 40 Am. St. Rep., 249; *In re Madera Irr. Dist.* (Cal.), 28 Pac., 272, 675; 14 L. R. A., 755; 27 Am. St. Rep., 106.

It is asserted, however that the amendments to the charter of Yazoo City, ordained November 15, 1901, and September 8, 1902, respectively, cannot stand the test, because they are not consistent with sec. 3039, ch. 69, p. 79, of the act of the legislature of 1900 amendatory thereto, are unconstitutional, and are, therefore, incapable of sustaining the foregoing charter amendments. Let us examine into this a little. We are free to admit that said amendments to the charter of Yazoo City are not consistent with section 3039 of the Code of 1892. Nor did the board have any special reason or desire to make them consistent with that particular section of the annotated

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Brief for appellant.

code. It was never contemplated that any amendment to any charter of any city, town or village, should be made consistent with section 3039; nor do we suppose our friends meant to put their objection just in this shape, but they meant to say that said amendments to the charter of Yazoo City were not consistent with certain parts of the municipal chapter of the code, to wit, sections 3014-3017. The only differences in the amendment of November 15, 1901, and section 3014 of the code are as follows: After the words "sewerage system" in the fifth line of section 3014 is inserted in the amendment the words "a street railway," which anyway would be included in the words "any other plant," in the fourth line of section 3014; also the provision of section 3014 with reference to the amount of bonds that may be issued is omitted under charter amendment of November 15th. The only difference between section 3015 of the code and the amendment of November 15th is that the rate of interest in section 3015 shall not exceed 7 per cent. per annum, while in the amendment of November 15th the interest shall not exceed 5 per cent. per annum. Section 3016 is identical with the amendment, while section 3017 and the amendment of September 8, 1902, to the charter of Yazoo City are identical. So that the amendment of September 8, 1902, is entirely consistent with section 3017 of the code, and all other provisions of chapter 93 of the code; and the amendment of November 15, 1901, is certainly consistent with section 3016 of the code and with section 3015 of the code, unless a less rate of interest than is prescribed in section 3015 is an inconsistency. And it would hardly be seriously contended that this is such an inconsistency as would be condemned by the court. Is the amendment of November 15, 1901, inconsistent with section 3014, within the condemnation of the law? It is true that the amendment does not embody the whole of the section, but it is hardly necessary that it should. Suppose, for instance, that Yazoo City had simply desired to amend her charter so as to give her the right to put in a waterworks system only,

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Brief for appellant.

and no other subject had been mentioned; would this have been an inconsistency such as the law would condemn? Must she take the whole of the section or none? Can she not take such part of it as she wishes? If she leaves out of her amendment the dotting of an "i" or the crossing of a "t," will it be condemned? Because she failed to place in her amendment the limitation that her bond issues should not exceed 7 per cent. of her taxable value without an election, and 10 per cent. with an election, is the whole amendment to be condemned? Especially when her proposed issuance of bonds, together with all outstanding bonds does not amount to even 7 per cent. of her taxable values. Will it not be time enough to condemn, as void, even if the amendment is not consistent with section 3014, when the issue exceeds 7 per cent. of the assessed value? That case is not now presented, and most likely will never be.

The record shows that the assessed value of real and personal property in Yazoo City is $2,702,931. Seven per cent. of this amount is $189,205.17. The present outstanding bonds are $5,080, to which add the proposed issue of $175,000, and we have a total of $180,080, or a fraction less than 6 2-3 per cent. of the assessed value of real and personal property in Yazoo City. But the argument of the other side is that not to fix a limit in the amendment is to permit the board of mayor and aldermen of Yazoo City to issue bonds in any amount—to open up the floodgates, as it were, and let the town council bankrupt the city by piling bonded debt upon bonded debt. If such an unfortunate condition of affairs should ever arise, we submit that it will be time then to look after it. Besides, no such power is committed to the town council. The people in the city have it in their own hands, under the amendments that are being so severely criticised, to say whether any bonds shall be issued. And it is very safe to assume that the people will not permit the city council to issue bonds in any amount or for any purposes other than for the city's good. In order to have an election as to whether any bonds shall issue, it is only neces-

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Brief for appellant.

sary that 20 per cent. of the adult taxpayers of the municipality shall petition against the issuance of the bonds, in which event they shall not issue until authorized by the majority of electors voting in an election to be ordered for that purpose. Notice must be given for three weeks in a newspaper published in the municipality of the proposed issuance of bonds, and thus the people are always on the notice of the amount to be issued, and the purposes for which they are to issue. In the present case no petition was presented to the board, because it could not be got up, presumably.

But the learned chancellor, in his opinion, says that the amendments are unconstitutional, under section 80 of the constitution, which reads, "Provision shall be made by general laws, to prevent the abuse by cities, towns and other municipal corporations of their power of assessment, taxation, borrowing money and contracting debts." With the greatest deference to the learned chancellor this section of the constitution has no more to do with the point involved in the present case than the king of the Fiji Islanders. Section 80 is simply an injunction to the legislature to pass a general law to prevent the abuses therein named. And the law to be passed is committed wholly to the discretion of the legislature, and must be general in its character; that is, applicable to every city, town, or village in the state, and not applicable merely to those accepting the code provisions as to municipalities. The legislature has passed such general law, and made it applicable to all cities, towns and villages; said law being section 3026 of the code, which provides the only general method that we have been able to find to prevent abuses mentioned in section 80 of the constitution. By section 3036, section 3026 is made applicable to all cities, towns and villages. The legislature evidently thought that section 3026 was ample to prevent the abuses referred to, and the legislature was sole judge of that. See *Rosenbaum* v. *Newbern,* 118 N. C., 83; 24 S. E., 1; 32 L. R. A., 123. It should be borne in mind, along this line, that Yazoo City, under her own char-

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ter, had the right to vote an unlimited amount of bonds for waterworks, electric light, and other purposes, and doubtless this will be found true of many, if not all, of the municipalities that refused to come under the code provisions; and we cannot, therefore, see how it can be seriously contended that the legislature, as to such municipalities, had in view any provision other than section 3026 to prevent the abuse mentioned in section 80 of the constitution.

Up to this point we have argued the question without reference to the constitutionality of chapter 69, p. 79, of the acts of the legislature of 1900. If chapter 69, p. 79, of the acts of 1900, is constitutional, that ends all possible contention as to the validity of the amendments to the charter of Yazoo City, and also all question as to the validity of the bonds proposed to be issued under said amendments, for it will be observed from the record that every requisite step was taken, even to the minutest detail, in providing for and in the sale of the bonds. Chapter 69 of the acts of 1900 differs from section 3039 in this only: that under section 3039 amendments to existing municipalities must be consistent with the municipal chapter of the code, while under chapter 69, p. 79, of the acts of 1900, they need not be consistent with the municipal chapter of the code, but, as under section 3039, must be consistent with the constitution and laws of the United States and the constitution of this state. With what provisions of the constitution and laws of the United States and of the constitution of this state is chapter 69, p. 79, of the acts of 1900, in conflict? It will be well here to remember why section 88 of the constitution was enacted, said section reading as follows: "The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment." The manifest reason was to relieve

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Brief for appellant.

the legislature absolutely of the consideration of so much legislation of a private character. Much of the time of the legislature had been occupied with private legislation, chief among which were municipal charters and amendments thereto. This was not only harrassing to the legislature, occupying much of its valuable time, but was also very expensive to the state. A remedy for this is provided for by section 88 of the constitution. The evident purpose of that section is to relieve the legislature entirely from consideration of the subject-matters named therein. It is very questionable, indeed, if the legislature could now pass a charter for any municipality, or an amendment to an existing charter, save in the manner prescribed by section 88; that is to say, grant authority in a general way, and enable a municipality to take advantage of it. Unless this is true, then the evil intended to be remedied by section 88 would only be half done. The scheme intended by section 88 was that the legislature should outline a general plan under which municipalites might thereafter be chartered, and also a general plan under which existing municipalities might have their charters amended, thus saving valuable time to the legislature, expense to the state, and providing an expeditious manner in which charter amendments may be obtained. Surely it was never contemplated that the municipality should have no discretion as to what should be embodied in its amendments; that the legislature must, in advance, specify, word for word, the kind of amendment the municipality might make. Surely it was never intended that a corporation accepting the provisions of the municipal chapter of the code should never thereafter in any way amend the same; and yet, if the conclusions of the learned chancellor in this case are to prevail, that result would follow, and the very purpose that section 88 of the constitution had in view would be greatly emasculated. Section 88 evidently means that the legislature, as to amendments, shall provide the general method, the manner, the mode, under which amendments may be made. This was done by section 3039—

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limited, however, by the condition that such acts must be consistent with the municipal chapter of the code. The legislature of 1900, seeing that this was an unreasonable and unnecessary restriction—one calculated to defeat the manifest purpose of section 88—removed the restriction, so that now, by pursuing the manner outlined by the legislature in chapter 69, p. 79, of the acts of 1900, amendments to the municipal charters may be made to any extent, so long as the provisions thereof are within the constitution and laws of the United States, and of the constitution and laws of Mississippi. It is simply the taking of another step toward permitting municipalities to amend their charters to suit their several necessities, which seems to be the trend of most legislatures and courts at this time. What evil can result from such a course?

Our friends on the other side say that this chapter 69, p. 79, of the acts of 1900, confers legislative power upon the municipality, and by section 33 of the constitution the legislative power of the state is vested in the legislature. They seem to lose sight of the fact that section 88 was inserted in the constitution for the very purpose of relieving the legislature of this class of legislation. Unless it is competent for the legislature to pass an act such as chapter 69, p. 79, of the acts of 1900, then what is to become of the first few sections of the municipal chapter of the code, whereby the limits and boundaries of unincorporated cities, towns, and villages may be defined, and whereby the present boundaries of cities, towns, and villages may be enlarged or contracted? How would it be possible for a legislature in a general way to define limits for every village to be thereafter incorporated—to define the limits to which boundaries of an existing corporation might be extended, or within which it might be contracted? It is absolutely necessary, to give full force and effect to section 88 of the constitution, to grant some discretion to municipal authorities, not only as to boundary, but as to many other subjects with which the municipality has to deal. Besides, it is familiar law that

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Brief for appellant.

the power of the legislature to enact laws, and the kind of laws it shall enact, is restricted or limited only where so expressly provided by the constitution. See *People* v. *Seumore,* 16 Cal., 332; 76 Am. Dec., 521; *Thorpe* v. *Rutland,* 27 Vt., 140; 62 Am. Dec., 625.

The question as to what is a delegation of legislative authority has been raised many times in this and other states. Every time the question has been presented in this state the court has uniformly overturned the objection that the given act was a delegation of legislative authority—notably in the case of *Alcorn* v. *Hamer,* 38 Miss., 652; *Schulherr* v. *Bordeaux,* 64 Miss., 59; 8 South., 201. In each of these cases the question as to whether that was a delegation of legislative authority was learnedly discussed by counsel and carefully considered by the court. This court, in the case of *O'Flinn* v. *McInnis,* 80 Miss., 125; 31 South., 584, overturned an amendment to the charter of Meridian, obtained under section 3039 of the code of 1892, because the same was inconsistent with section 3022 of the code of 1892, at the same time stressing the fact that the amendment was passed prior to the adoption of chapter 69, p. 79, of the acts of 1900. There is no escape from the conclusion that, had the amendment been passed after the acts of 1900, its inconsistency with section 3022 would have made no difference, and the same would have been upheld by the court, and properly so.

We also invite the court's attention to the case *In re* Madera Irr. Dist., 27 Am. St. Rep., 106; 92 Cal., 296; 28 Pac., 272, 675; 14 L. R. A., 755, where there is full discussion of the question as to the delegation of legislative power; also to the case of *State* v. *Doherty,* 58 Am. St. Rep., 39; 16 Wash., 582; 47 Pac., 958, where an amendment to the charter of Tacoma, which amendment was proposed by the council and adopted by the vote of the people, was expressly upheld; also to *Attorney General* v. *Shepard,* 62 N. H., 383; 13 Am. St. Rep., 576, and authorities there cited.

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Brief for appellant.

The court will also note that, under chapter 47 ("Fences and Stock"), code 1892, the boards of supervisors of the various counties are given almost plenary power with reference to fences, stock-law district, etc., and under chapter 54 ("Game and Fish") the boards of supervisors are given full authority for the protection and preservation of game and fish in their respective counties; and the right of the legislature to delegate this authority has never been questioned, as far as we know. Under chapter 25 ("Corporations"), even private corporations, other than railroads and insurance companies, are authorized to prepare their own charters, and to specify the powers to be exercised (see section 833). Again, it is familiar law that public corporations may be invested with the power which the legislature itself might have exercised. See *In re* Madera Irr. Dist., 92 Cal., 296; 28 Pac., 272, 675; 14 L. R. A., 755; 27 Am. St. Rep., 106; *St. Paul* v. *Colter,* 12 Minn., 41 (Gil. 16); 90 Am. Dec., 278; *State* v. *Fourcade,* 45 La., Ann., 717; 13 South., 187; 40 Am. St. Rep., 249. But even if the court should think that a part of the ordinance amending the charter of Yazoo City is void, the whole ordinance does not necessary fall, unless the valid part cannot stand alone, or be separated from the void parts. *City of Tampa* v. *Salomonson,* 35 Fla., 446; 17 South., 581; *Canova* v. *Williams,* 41 Fla., 509; 27 South., 30; *New Orleans* v. *Chappus,* 105 La., 179; 29 South., 721.

As to the objection that section 3039 and the acts of 1900 were not referred to the committee on local and private legislation of the legislature of the house in which they originated: Under section 89, on which the other side rely, it would not have been proper to have referred either of the acts to such a committee, for the reason that neither of them was a local or private bill, but most general in their character.

The learned chancellor says in his decree that it almost clearly appears to him, under the decision of *Lum* v. *Vicksburg,* 72 Miss., 950, 18 South., 476, that section 88 of the constitution

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Brief for appellee.

is prospective in its operation; and, if this be true, that ends all questions as to the validity of the amendments to the charter of Yazoo City. If his vision as to the prospective idea is correct, his conclusion is irresistible, and section 88 goes "where the woodbine twineth." *Lum v. Vicksburg* only goes to the extent of holding that section 88 was never intended to force compulsory legislative repeals of existing municipal charters. This, to our mind, is too clear for further argument.

As to the fourth objection against the bonds, viz., that they are void because the voters were not given the opportunity to vote for or against the issuance of said bonds for the several objects for which they are proposed, said proposed issue of bonds containing three separate and distinct objects, which should have been submitted separately. The case of *Kemp* v. *Town of Hazelhurst,* 80 Miss., 445; 31 South. 908, effectually settles this contention.

In conclusion, we beg to say that it is important to all parties connected with this litigation that the decision of the court go to the extent of determining unequivocally the validity or invalidity of the bonds which have been sold, but not yet issued, and which cannot be issued, now their validity has been questioned, until their validity is definitely determined by this honorable court.

E. L. Brown and *Barnett & Perrin, amicis curiae.*

Appellee not being represented by counsel, we ask the privilege, as friends of the court, to file a brief, representing, as we do, interests that may be affected by a decision adverse to him.

The validity of the proposed bond issue depends on the constitutionality of chapter 69, p. 79, of the acts of 1900, amending section 3039 of the code of 1892. It may also be insisted by appellant that the amendment under which the proposed bond issue is to be made conforms substantially to the requirements of section 3039 of the code of 1892.

(1) Is the act of 1900 unconstitutional? This act permits

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Brief for appellee.

amendments to charters of municipalities which have elected not to come under the municipal chapter of the code of 1892, and provides only that such amendments shall be consistent with the construction of the state of Mississippi and the constitution and laws of the United States. This act, we think, is unconstitutional, unless it can be sustained by section 88 of the present constitution. That section reads: "The legislature shall pass general laws under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered. . . ." Section 33 of the constitution vests the legislative power in the legislature. If there is any apparent conflict between sections 88 and 33 of the constitution, these sections must be reconciled, if possible. The argument of appellant is that section 88 limits section 33 and empowers the legislature to delegate its legislative powers, so far as cities and towns are concerned; that section 88 does not require that cities and towns shall be governed by general laws, but that they shall be chartered under general laws. Section 88 is construed as meaning the legislature shall by general laws provide for the framing of a municipal charter, or amendments thereto, by persons or bodies selected by the legislature for that purpose, and that such persons or bodies can confer by charter on municipalities any and all powers, provided they be consistent with the constitution of Mississippi and the constitution and laws of the United States; that, as towns and cities are to be chartered under general laws, such charters must emanate from some authority named by the legislature, and not from itself, and, inasmuch as such charter is conferred by this outside authority, this authority has the right to confer on the municipality powers limited only by the constitution of Mississippi and the constitution and laws of the United States. It is true that the charter may be granted by some person or body selected by the legislature, but it is also true that when such charter is granted

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Brief for appellee.

it must conform to general laws which the constitution requires the legislature to enact. It will be observed that the supposed necessity for some authority other than the legislature to grant the charter is wholly inferential, and has no foundation in fact, as, under section 88 of the constitution, the legislature could grant the charter without any delegation to an outside authority to do so. And while the legislature can delegate this naked power, as the legislature itself would have to enact general laws under which it could charter municipalities, certainly there must be general laws enacted by the legislature for the government of municipalities, to which the authority outside of legislature must conform in granting charters. Section 88 of the constitution requires general laws. Its purpose is to prevent special and local legislation—to secure uniformity. But how can this purpose be accomplished by the legislature enacting a law providing simply in what way charters can be granted, or amendments thereto made, while omitting to prescribe what such charters, and amendments thereto, shall contain? If it be true, as contended for by the appellant, that the act of 1900 is constitutional, then it is in the power of the legislature to enact a similar law for the creation of private corporations.

(2) As already stated, it will be urged by counsel for appellant that, while the act of 1900 may be unconstitutional, yet the amendment attacked substantially complies with the code municipal chapter, and can therefore be upheld under section 3039 of the code of 1892. This position assumes that section 3039 is constitutional, which we do not concede. If, however, section 3039 is constitutional, is the amendment attacked consistent with the code municipal chapter? Section 3014 of the code authorizes the issue of bonds, etc., by a city, town or village, in an amount not in excess of 7 per cent. of the assessed value of the taxable property of the city, town or village, unless authorized by two-thirds of the qualified electors thereof, but in no event can the amount issued exceed 10 per cent. of the assessed value. The amendment attacked has no such limita-

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Brief for appellee.

tions to it. Under its terms, bonds and obligations to an unlimited amount can be issued. In passing on the constitutionality of a statute, courts do reject at times the parts held unconstitutional, and uphold the law as far as it is constitutional, but this is never done where the intention of the legislature will be defeated. Under its charter, and before this amendment, Yazoo City could, under its charter, when authorized to do so by two-thirds of its qualified electors, issue bonds in an unlimited amount. (Section 66 of the charter.) Under section 3039 of the code, the proposed amendments are to be prepared in writing, and are to be published for three weeks in a newspaper. If one-tenth of the qualified electors object to the amendment, the amendment is then submitted to a vote, and can only be adopted when ratified by a majority of the electors of the municipality. The preparation in writing of the amendment, and its publication, are required, so that no amendment can be adopted without the consent of at least a majority of the electors of a municipality. Amendments must either expressly or impliedly receive the sanction of the electors. This being the purpose of section 3039, manifestly the amendment prepared in writing and published must be the amendment adopted, and no other. To reject any part of the prepared and published amendment—to qualify it in any respect, and declare it adopted as thus qualified—would be the adoption of something the electors had never had the opportunity to reject. To uphold this amendment by reading into it the limitations contained in section 3014 would be giving effect to an amendment not adopted in the manner required by section 3039. Citizens of Yazoo City had the right, under section 66 of its charter (Laws 1884, p. 596, ch. 405), to issue bonds in an unlimited amount, provided two-thirds of the qualified electors ratified the issue. An amendment is prepared, which, in terms, still leaves the amount for which bond may be issued unlimited, but providing another method for the ratification of the bond issue. As thus prepared and published, it met with

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Brief for appellee.

no protest, perhaps for the reason that the amount of issue was by the amendment still left unlimited. In the face of all this, the court is requested to read into the amendment the limitations imposed by section 3014, and declare that in the adoption of the amendment there has been a substantial compliance with section 3039. It may be that the electors, who by their silence, assented to the amendment as proposed, would not have assented to an amendment with a 7 per cent., or even a 10 per cent., limitation, believing that neither amount would be sufficient to establish the proposed plant. We think, also, that section 3039 of the code of 1892 is unconstitutional. All it requires is that the amendment provided for by it shall be consistent with the code municipal chapter. This is a delegation of legislative power. There could be an amendment consistent with said chapter, or, rather, not inconsistent with it, as such amendment might cover matters not contemplated by said chapter. We understand the law in this state to be that the legislature only can enact laws. We also appreciate the fact that the operation of such laws can be made dependent upon a contingency. But the law which is to operate when the contingency happens must be a law complete in itself. In *Lum* v. *City of Vicksburg,* 72 Miss., 950; 18 South., 476, the court held that that was a complete law, which, as to existing municipalities, became operative or inoperative upon its acceptance or rejection by the municipality. Section 3039 goes far beyond this. It permits municipalities existing at the time of the adoption of the constitution to adopt any one of the sections in the municipal code chapter as an amendment to its original charter. The municipal code chapter, if treated as a law enacted by the legislature, to be adopted on a contingency, must be adopted as a whole. To permit a municipality to adopt any particular provision of said municipal code chapter, and reject the other portions of said chapter, is to permit said municipality to pass upon the expediency or inexpediency of the law, and this would be unconstitutional.

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Brief for appellee.

(3) It may be that, under the allegations of the bill of the appellee, he has shown no grounds for an injunction; and, if this be true, this court may not be called upon to pass upon the merits of the case. Appellant has waived, or attempted to waive, any objection of this kind, so as to get this court to pass upon the constitutionality of these laws. Whether or not such waiver can be made, we submit to the court. But if the court holds that it has jurisdiction, we know that it will give a very careful consideration to all questions involved.

On the third point suggested in our brief, we desire further to call the attention of the court to the following facts:

That it is apparent that the present suit is a friendly one. This is manifest not only from the fact that appellant has waived, or attempted to waive, an important matter as to the granting of the injunction, viz., whether, if the grounds as alleged in the appellee's bill are true, the appellee would be injured by the issuance of the bonds, but also from the fact that appellee, in a case of this importance, is unrepresented in the court by counsel. Under the state of affairs, we doubt very much whether the court is called upon to pass upon the constitutionality of a statute. The United States supreme court, in *Chicago, etc., R. Co.* v. *Wellman,* 143 U. S., 339; 12 Sup. Ct,. 400; 36 L. Ed., 176—a friendly suit—refused to pass upon the constitutionality of an act of the legislature of the state of Michigan, and, in discussing the question, among other things, says: "The theory upon which, apparently, this suit was brought, is that parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not the case. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise

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Opinion of the court.

of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts." If this principle is true, and this court is satisfied that this is really not a suit "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another," then we submit that the constitutionality of the question involved should not be passed on.

On the question of the constitutionality of section 3039 and the acts of 1900, we desire to call the attention of the court to the case of *Ex parte Moore,* 62 Ala., 471. In this case there was a general law for the incorporation of municipalities. The town of Numford, however, had had a special act of the legislature passed, incorporating it, but had never pretended to act under the special act, but attempted to incorporate under the general law, a law which provided not only the machinery by which a town could be incorporated, but was general in its provisions as to the manner of the government of the town in all particulars. It was held that such act on the part of the town was illegal, and that towns could not have at one and the same time two existing charters. *Ex parte Moore,* 62 Ala., 471; Code (Aa.), 1876, § 1763, *et seq.*

We do not think the argument in the brief of counsel for appellant that, if this law is unconstitutional, then the chartering of all private corporations must be unconstitutional, is at all sound. Private corporations have not the power to pass laws declaring certain acts unlawful, while municipal corporations have such power; and the fact that such law with regard to municipalities, under the code of 1857, was enacted, and not declared unconstitutional, seems to be more than met by the fact that it was repealed.

Argued orally by *J. A. P. Campbell,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The question presented for decision is whether section 3039

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of the code of 1892 is constitutional, and also whether the act of March 12, 1900, p. 79, ch. 69, amending section 3039 of the code, is constitutional.

The only difference between section 3039 and the act amending it is that the former requires amendments of the charters of municipalities not governed by the code chapter to be consistent with the provisions of the chapter, whereas the amending act permits such amendments, though inconsistent with the provisions of the code chapter on municipalities. The ground on which the constitutionality of these acts is challenged is that, as claimed, they delegate the exercise of legislative power to municipalities. It is claimed that, under section 88 of the constitution these acts are unconstitutional. That section is as follows: "The legislature shall pass general laws under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment." The argument is thus clearly put in an excellent brief filed by learned counsel, as *amicus curiae*: "It is true that the charter may be granted by some person or body selected by the legislature, but it is also true that, when such charter is granted, it must conform to general laws which the constitution requires the legislature to enact. It will be observed that the supposed necessity for some authority other than the legislature to grant the charter is wholly inferential, and has no foundation in fact, as, under section 88 of the constitution, the legislature could grant the charter without delegation to an outside authority to do so. And while the legislature can grant this naked power, as the legislature itself would have to enact general laws under which it could charter municipalities, certainly there must be general laws enacted by the legislature for the government of municipalities, to which the authority outside of the legislature must conform in granting charters. Section 88 of the constitution requires gen-

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eral laws. Its purpose is to prevent special and local legislation—to secure uniformity. But how can this purpose be accomplished by the legislature enacting a law providing simply in what way charters can be granted, or amendments thereto made, while omitting to prescribe what such charters, or amendments thereto shall contain?"

We cannot concur in this construction. It will be observed that counsel frankly state that, under their view of section 88 of the constitution, the legislature must not only pass a law general as to the manner in which the charters of municipalities may be amended, but such general law must actually contain, and fully set out, the entire contents of the municipal charters, or the entire contents of the amendments of municipal charters. Such general law, under that view, must not only be uniform in prescribing the mode in which such charters are to be granted or amended, but for all municipalities coming under the code chapter the charters must be the same throughout all their contents, and, for municipalities not coming under the code, the contents of each charter, or each amendment, must be prescribed minutely by the legislature. This is the inevitable deduction from the argument for the supposed uniformity. We say "supposed uniformity," because it is obvious that there would clearly be no uniformity, as to the contents of such charters, save in municipalities governed by the code chapter. For them the code chapter would be the charter; but, as to municipalities not governed by the code chapter, each one might have charter provisions different from every other one, and there would be no such uniformity as the view presupposes.

The framers of the constitution must have seen this incongruity, and since it was optional with the municipalities to come under the code chapter, or stay out, and since, as to all which stayed out, uniformity as to the contents of their charters was impossible, the inference is irresistible that the framers of the constitution never meant section 88 to secure uniformity in the contents of the charters of municipalities. Suppose (a con-

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dition which might have happened) one-tenth only of the municipalities had come under the code chapter; clearly this supposed uniformity would exist as to one-tenth, and not exist as to nine-tenths, of the municipalities in the state. Is it conceivable that the framers of the constitution, building with respect to existing as well as future conditions, would adopt a provision, under the practical operation of which such a condition as supposed above could obtain, if their purpose had been to secure uniformity as to the contents of charters by section 88? Manifestly not. Again, what an utterly incongruous situation we would have under counsel's construction in another respect, to wit: The framers of the constitution would be put in the attitude, whilst seeking the supposed uniformity, of actually providing themselves two sorts of charters for municipalities—one, the code chapter on municipalities, for all coming under it, and, for all not coming under it, as many different charters as each municipality might ask at the hands of the legislature.

Counsel surely overlooked the folly which this view would attribute to the framers of the constitution. The truth is not only that the framers of the constitution never intended the charters of municipalities to be uniform in their contents, but that it would have been exceedingly unwise to have made any such provision. There was a uniformity intended to be secured, but that was uniformity only as to the general mode of granting and amending charters. It was thought far more convenient, as ridding the legislature of useless special applications for such charters and their amendments, and as securing for the public service far more important legislation, the time that had theretofore been uselessly consumed in the consideration of such special application, to direct that thereafter—that is to say, after the adoption of said section 88—the legislature should provide a general law, prescribing a uniform mode, in conformity with which municipal charters should be granted and amended. That the legislature has done. The code chapter executes the mandate as to all municipalities coming under

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it, and section 3039 executes it as to all other municipalities. Section 3039 is as perfectly a general law as the code chapter on this subject. One is general as to one class of municipalities; the other is general as to the other class of municipalities. Section 3039 not only possesses the characteristics of a general law, in prescribing for all corporations not coming under the code chapter, and which preserve their original charters, the mode whereby they might amend such charters, but also secures uniformity as to this mode of amending their charters by all municipalities. But we have said it would have been exceedingly unwise on the part of the framers of the constitution to have attempted to secure uniformity in municipal charters. The principle is thoroughly established that the legislature may commit to local agencies the framing of such provisions as will best conserve their varied local interests. No legislature is as competent to frame such provisions as are the properly constituted authorities of such local subdivisions of the government. It is the very essence and soul of local home rule that they should be permitted to provide the manifold provisions imperatively called for by the multitudinous different needs of different communities. The doctrine is thus accurately expressed by Mr. Cooley: "The maxim that legislative power must not be delegated is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the policy and propriety of vesting in the municipal organization certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority." Again he says: "The right of the legislature, in the entire absence of authorization or prohibition, to create towns, etc., and confer on them the power of local government, and especially of local taxation and police regulations usual with such corporations, would always pass unchallenged."

The constitution of 1890 was framed by great lawyers in full view of this legal principle, and also with full knowledge of the

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immemorial usage in this state in such matters. See *Alcorn* v. *Hamer,* 38 Miss., 652; *Williams* v. *Cammack,* 27 Miss., 221; 61 Am. Dec., 508; *Barnes* v. *Pike County,* 51 Miss., 305; *Schulherr* v. *Bordeaux,* 64 Miss., 59; 8 South., 201; *Lum* v. *Vicksburg,* 72 Miss., 950; 18 South., 476. It was provided in the code of 1857 (ch. 35, art. 1, §§ 1-3) how corporations might be created; section 1, art. 1, providing "that the persons desiring to be incorporated" might prepare a charter, which should contain, among other things, "the powers to be exercised," and providing that, after approval by the governor and attorney general, "the powers therein specified should be vested in the corporation," and also providing that such charters might be "amended or renewed in like manner." This has been the law practically ever since, and the only change—a very great and useful change, it is true—acomplished by section 88 of the constitution is in providing that the legislature should be freed from the nuisance of having to deal separately with each and every charter and its amendments; referring the granting and and amending of such charters, as to the mode of granting them and the mode of amending them, to the operation of general law. The fallacy of the opposite view is in supposing that the code chapter on municipalities was essential to the execution of the mandate of section 88 of the constitution. Had that chapter not been adopted, the legislature would have complied perfectly with the mandate of section 88 of the constitution, by passing some statute like section 3039 of the code, whereby a uniform mode of granting and of amending charters might have been prescribed.

The code chapter on municipalities is, in our judgment, an exceedingly wise one. It furnishes for all municipalities which do come under it a charter doubtless far superior to most which would be otherwise drawn. And it is a little difficult to perceive why there is any hesitation to avail of its provisions, except in those cases where certain local conditions, in certain quarters, make their original charters better suited to the needs

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of certain municipalities. But all this granted, it is an exceedingly erroneous idea to entertain that section 88 of the constitution requires the contents of charters of municipalities to be prescribed by some uniform legislative act, or that the legislature, in adopting the code chapter, was complying with any such supposed mandate of said section 88. That view is at war with immemorial usage in this state on this subject, with the whole trend of our decisions on the subject, and with what wisdom imperatively requires, as demanded by the varying needs of different communities.

One or two other considerations may be indulged: All corporations other than municipal corporations, railroad corporations (other than street railroads), and insurance corporations, are provided for, as to the granting and amending of their charters, by chapter 25 of the code of 1892. Section 833 of that chapter is substantially identical with chapter 35, art. 1, of the code of 1857, heretofore referred to. The able lawyers who framed the code of 1892 expressly provided, in section 833, that "The persons desiring to be incoroporated" may prepare their own charter, setting out themselves, therein, "the powers to be exercised," and all its contents; and said charters, when approved by the governor and attorney-general, become the law of the corporation; and section 834 provides for amendments to be made similarly. These learned code commissioners knew that the legislature, in obeying section 88 of the constitution, which declares that "the legislature shall pass general laws under which corporations may be created, organized, and their acts of incorporation altered," had perfect power to provide a law such as sections 833, 834, prescribing simply and merely a uniform mode, according to which corporations might obtain and amend their charters, without prescribing any such uniformity as to the contents of the charters. What the charters would contain would depend upon the 10,000 businesses incorporated, just as what municipal charters should contain depends upon the varying needs of every community.

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And it is perfectly obvious that, in executing the mandate of section 88 of the constitution, the legislature had precisely the same power to authorize the incorporators of municipalities to frame charters, and state the powers to be exercised that it had in the case of the corporations provided for by chapter 25 of the code of 1892. Section 88 commands the legislature to pass general laws, as to both municipal corporations and other corporations (of the kinds stated above), respecting the granting and the amending of their charters, and the power of the legislature is the same as to both. It is also very pertinently asked by counsel for appellant how section 2912*a et seq.* and section 2921 of the code of 1892, which are general laws providing a uniform mode by which the boundaries of then existing municipalities might be enlarged or contracted, and by which hamlets and villages to become incorporated thereafter might define their boundaries, could be passed by the legislature, unless it had the power to authorize such existing municipalities and such hamlets and villages to specify, themselves, the contraction or enlargement of boundaries desired in the one case, or the definition of boundaries desired in the other?

There is nothing in the proposition that the different improvements were not voted for separately. The complete reply is that no law required this to be done. We have given this case the careful consideration which its great importance demands, and have not failed to weigh fully the opinion of the very accomplished chancellor of the court below. We have been unable to concur in the view which he announced. We think both section 3039, and the act of 1900 amending it, are perfectly valid legislative acts.

We direct the reporter to set out in full the briefs of all counsel in this case. We have derived great aid from them ourselves, and they will facilitate the profession in investigating the matter.

We think the suggestion untenable that this is not a real contest between the parties. The court below treated it as such,

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Syllabus.

and it manifestly is "a suit in pursuance of an actual antagonistic assertion of rights by one party against another."

Reversed and remanded.

LOUISVILLE & NASHVILLE RAILROAD CO. v. GULF OF MEXICO LAND & IMPROVEMENT CO.

1. VENDOR AND VENDEE. *Contract for conveyance. Option.*

A contract to convey a strip of land across certain sections along a railroad, one hundred feet wide on either side of the track, as surveyed, located and staked, at any time within two years from date, when requested by the railroad company and upon the payment of a stipulated sum, is but an option.

2. SAME. *Adverse possession. Necessity of exclusive possession. Innocent purchaser.*

A railroad company, claiming under such a contract, never recorded, having for more than ten years used and enclosed only a strip fifty feet wide on either side of its track, the same being sufficient for all of its purposes, and allowed the landowner to use and enclose the balance, cannot claim said balance by adverse possession; nor can it as against innocent purchasers for value claim that the legal title to said balance was held in trust for it.

3. SAME. *Possession of part of tract. Extended by construction. Limitation on doctrine.*

Actual adverse possession of a part of the land described in an unrecorded conveyance under which the possessor claims title will extend a constructive actual possession only to so much of the land as is used in connection with the tract actually possessed and which is reasonable and proper for that purpose, according to the custom of the country.

FROM the chancery court of Jackson county.
HON. STONE DEAVOURS, Chancellor.

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Brief for appellant.

The Gulf of Mexico Land & Improvement Co., appellee, was complainant in the court below; the railroad company, appellant, was defendant there. From a decree in complainant's favor the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Gregory L. Smith, for appellant.

The original grantee entered the property under the bonds for title and claiming the entire strip of land, and it and its successors remained in such possession for thirty years. Appellee claims that at the expiration of the two years from the date of the bonds for title the right under the bonds for title expired. If that be true, then from October 26, 1869, appellant and its predecessors in title, wrongfully held the possession of said property, claiming title thereto under such bonds, and the character of the holding—the occupancy of part of the land with its railroad—was such as necessarily gave notice to the owners that it claimed and owned the lands adversely to them. This is not denied by appellee, for it admits that appellant obtained title by adverse possession to one hundred feet in width of the two hundred feet strip. This possession, therefore, ripened into title October 26, 1879, and this possession being of a part of the strip under color of title to the whole was possession of the whole strip and title to the whole strip ripened in appellant October 26, 1879. *Niles* v. *Davis,* 60 Miss., 755; *Davis* v. *Davis,* 68 Miss., 478; *Wilson* v. *Williams,* 52 Miss., 487.

Complainant admits that this would have been the case had the transactions been between individuals and the occupancy of the one hundred feet strip been for ordinary purposes, but it claims that as the occupancy was for right of way purposes and as the defendant did not need but one hundred feet in width for such purposes, it will be presumed that it only claimed what it needed. The contention is not sound in itself, for the same rule would equally apply to a farmer or any other person. Suppose a farmer occupied one hundred acres under color of title cover-

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Brief for appellee.

ing an entire section, would the fact that he only needed one hundred acres for farming purposes raise a presumption that he did not claim to the limits of his color of title?

It is again claimed that appellee's contention is sustained by the case of *V. & M. R. R. Co.* v. *Barrett,* 67 Miss., 585, but such is not the case. The contract under which the railroad claimed in that case did not specify the lands to be held under it; it merely authorized the company to locate and use a right of way over the lands not exceeding one hundred feet in width; until the right of way was located and laid out the contract described no lands, and after the right of way was located and laid out, by reference, described only the right of way as laid out, so that when possession was claimed under that instrument the claim was limited by the very terms of the instrument to the right of way laid out, and did not, therefore, extend beyond it. In the case at bar, the description of the property covered by the contract is specific and definite in itself, and does not depend for definiteness upon the future acts of the railroad, and when possession was taken under it the limits of the possession were definitely defined by it.

The contention that the nature of defendant's necessities and use of the property raises the presumption that it only claimed one hundred feet is in direct contradiction of the fact that it was "claiming the right thereto (the lands) under the said instruments of which Exhibits A and B are copies and in no other way."

Appellee again contends that as appellant's color of title was not recorded, it was a *bona fide* purchaser of the land without notice. This position is not well taken; appellant's possession of part of the tract under color of title gave constructive notice of the extent of its claim as shown by its color of title.

Green & Green, for appellee.

The asserted rights of the defendant are founded upon two unrecorded, ancient documents, executed over a quarter of a century ago.

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Brief for appellee.

Let it be carefully noted by these instruments no land was conveyed to the railroad company. They did not operate *in praesenti* as a vestiture of the title in the appellant. That the interest that appellant had was an option to purchase certain lands based upon a valuable consideration, but this option was upon special terms and conditions to prove the performance of which the burden rested upon appellant. To make successful claim under these options it developed upon appellant to show affirmatively the performance of the conditions:

1. The option had to be exercised within two years after its date.

2. Upon the express condition that the party of the second part, their sucessors or assigns, pay the full sum of one dollar for the amount of land to be conveyed.

The idea of an adverse possession is excluded entirely. In the nature of things, there can be no adverse possession when the land is not held exclusively under claim and color of title.

Appellant claims under a voluntary, unrecorded option, defunct and impossible of performance under its very terms, while on the contrary the claims of appellee are based upon value paid to the parties who upon the face of the records were its true and lawful owners. Our vendors upon the face of the record had the perfect title to all of the land we bought. We examined the records, upon them we acted *bona fide,* paid value, and are we now to be deprived of the fruits of our purchase, for the benefit of a party who has slumbered over his rights for over thirty years, for the benefit of one who has violated the plain behest of the law in not recording the deed?

Upon the face of the record our vendors and their predecessors in title appeared to be the legal owner. The record showed this. The appellant had its track fenced and was in possession of the land so enclosed.

We deny that appellee had constructive notice of the claims of appellant. We freely admit that if a party is in actual and open possession of land that he need not record his deed, as

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Opinion of the court.

all parties will have constructive notice of his title to the land, but we affirm that the fact of possession of our tract, enclosed and under fence, will not impart notice of title to another parcel of land unfenced, and uninclosed and over which no visible acts of ownership are exercised, or even though adjoining the enclosed track when the vendor of the land owns all of the same. Let it also be noted that one strip of this land was in our actual possession and under fence and that the rest was wild land and that as to them the possession was joint, and as to them there had been no change in the occupancy, nothing definite to put a purchaser upon notice, and upon inspection it would appear to be all part of one tract and nothing to distinguish the same. *Billington* v. *Welsh,* 6 Am. Dec. (Penn. 1812), 406; *Bell* v. *Twilight,* 45 Am. Dec. (1845), 367.

The possession by appellant, at best, was only a joint possession with appellee, and under the settled rule this is not enough. *Boyce* v. *McCullough,* 39 Am. Dec. (1842), 35; *Butler* v. *Stevens,* 26 Me. (1847), 490; *McCarthy* v. *Nicrosi,* 72 Ala. (1842), 334.

In *Loughbridge* v. *Bowland,* 52 Miss. (1876), 553, the law is correctly declared when it is said: "But, that possession may have the effect of protecting the title under which it is held, it must be of that character which would arrest attention. See also *Stevens* v. *Magee,* 81 Miss., 644.

Argued orally by *Garner W. Green,* for appellee.

CALHOON, J., delivered the opinion of the court.

The appellee filed its bill in the court below to remove appellant's claim to certain lands as a cloud upon its title. The land in question consists of two strips of 50 feet each, in width, adjoining on either side the fenced right of way of appellant of 100 feet, the amount fenced being 50 feet on either side of the center of the actual railroad track. As to this 50 feet of fenced land there is no claim. There is no dispute whatever about the

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Opinion of the court.

facts. On the 26th of October, 1867, D. Lewis and A. E. Lewis, under whom both sides to this litigation claim, executed their separate instruments, Exhibits A and B to answer, evidencing their contract with a corporation then known as the New Orleans, Mobile & Chattanooga Railroad Company, wherein the following language is used: "The said party of the first part, for the consideration of the sum of one dollar in hand paid, and the further consideration of the benefits derived from the location of the railroad of said party of the second part across the land of the party of the first part, do by these presents hereby agree to the contract and sell and convey by deed of warranty to the party of the second part a strip, parcel or piece of land situate in the county of Jackson and state of Mississippi, being a part of sections [here stating them], and described as follows: Being a strip of land two hundred feet wide, and extending across the lands of the party of the first part, and lying one hundred feet wide on each side of the center line of the railroad of the party of the second part as surveyed, located and staked across the lands aforesaid by the officers of the party of the second part; and the party of the first part agrees to execute and deliver to the party of the second part a warranty deed to said land at any time within two years from the date of this instrument, whenever required by the party of the second part so to do; provided and upon condition, nevertheless, that the said party of the second part, their sucessors or assigns, or legal representatives, pay to the party of the first part the whole sum of one dollar for the amount of land so conveyed as aforesaid in lawful money of United States. And the party of the second part hereby covenant and agree with the party of the first part that they will pay to the party of the first part the full sum of one dollar for the full amount of the land conveyed to them by the party of the first part upon the execution and delivery of the warranty deed to them as aforesaid by the party of the second part of the lands and premises described as aforesaid." These deeds have never been recorded. It will be noted that appellant admits in its an-

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swer that the legal title is in appellee, but sets up that it holds the legal title in trust for appellant.

It is agreed by the parties that D. Lewis and E. A. Lewis executed these deeds in 1867, and that E. A. Lewis, with full notice of these deeds, acquired the title of D. Lewis to all the lands, subject, of course, to any interest inuring to the grantee railroad company under the deeds, and that A. E. Lewis died testate on the 31st day of December, 1885, and that on January 27, 1890, his devisees conveyed to H. F. Russell, and that Russel, on June 2, 1890, conveyed to Jno. B. Lyon, who conveyed to complainant below (appellee here); and that these conveyances subsequent to the death of A. E. Lewis conveyed the whole property, without any exception or reservation whatever of the 200 feet of land of which 100 feet are now in controversy; and that all of these successive purchasers after the death of A. E. Lewis paid value, and had no notice whatever of the unrecorded contracts of A. E. and D. Lewis above mentioned, unless they are affected with notice of the claim to the whole 200 feet by the railroad company by the fact of half being under fence. It is further agreed between the parties that the New Orleans, Mobile & Chattanooga Railroad Company built its railroad on a right of way cleared out not exceeding 100 feet as surveyed, located, and staked and used said railroad, without fencing any part of the land, and that on January 1, 1869, it executed a trust deed on all its properties and franchises, and that by foreclosure of the trust the property, rights, and franchises were sold and became the property of a concern styled the New Orleans, Mobile & Texas Railroad Company, on April 28, 1880, which latter company thereafter operated the railroad, but without fencing any part of it, up to October 5, 1881, when this company conveyed all its rights and franchises to the Louisville & Nashville Railroad Company (appellant here), which took possession and operated the railroad without fencing any part of the land until some time in the year 1883, when it agreed with A. E. Lewis to fence in its track between West Pascagoula and Fountainbleau

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Opinion of the court.

and for some distance east of Fontainbleau, and accordingly did, in the year 1883, fence in its track by placing a fence on each side of it at a distance of 50 feet from its center on either side; and that appellant has operated its railroad and maintained that fence up to some time in the year 1901, when it rebuilt its fence on each side of the track at a distance from the center of 100 feet instead of 50 feet, as before. It is further agreed that the land in dispute is uncultivated, and that none of the occupying railroad companies have ever exercised any visible acts of ownership over any part of the land not inclosed by the fences erected in 1883 until the year 1901, when the fences were extended to inclose 200 feet instead of 100 feet, as before. It is further agreed between the parties that, after the erection of the fence in 1883, A. E. Lewis ran a fence from the point where the western line of section 32 (part of the land conveyed) intersects the railroad for a distance of a mile and a half to Gravelline Bayou, which connects with the gulf or bay and the West Pascagoula river, and extends from the gulf or bay to the railroad track; so that, after this fence was built, a tract of land south of the track was bounded on the west by this fence and Gravelline Bayou, and on the south by this bayou and the gulf, and on the east by West Pascagoula river, which boundaries, in connection with the railroad fence, formed a pasture from which cattle could not escape, and that E. A. Lewis in his life used this inclose as a pasture, which use was continued to the time of sale to complainant, and the complainant has from time to time rented it under verbal leases for pasture purposes, and this use has been continuous up to the date of the lawsuit. It is further agreed by the parties that neither appellant nor any of its grator companies has ever needed for use as right of way any more than 100 feet in width. On the pleadings, exhibits, and agreed state of facts the chancellor below decreed for the appellee.

Very clearly, Exhibits A and B conveyed no title whatever to the original railroad company. They are in no sense convey-

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ances. They are not bonds for title. By them the railroad company acquired simply an option to demand conveyances, but this right to demand could not be exercised unless within two years from October 25, 1867, the date of the instruments, and not then without tender of the purchase price, and then only for 200 feet "as surveyed, located, and staked." Without compliance with the express conditions, the railroad company had no rights unless such as they might acquire by actual adverse possession exclusive in its nature. 1 Am. & Enc. of Law, 857-859; 3 Wash. on Real Prop. (6th Ed.), sec. 1981. The railroad company undoubtedly acquired title by prescription to the 50 feet on each side of its track which it fenced in in the year 1883, but only because of the inclosure did it acquire any title to that, even as against D. Lewis and A. E. Lewis, much less as against innocent purchasers under them.

There is another principle which defeats the claim of appellant. The doctrine of constructive adverse possession coextensive with the description in the conveyance "will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country." 1 Am. & Enc. of Law, 864. There is no proof of this, and so, even if the option was a conveyance, appellant's claim falls. *Jackson* v. *Woodruff,* 13 Am. Dec. 525; *Day* v. *R. R. Co.,* 41 Ohio St., 392; *Thompson* v. *Burchans,* 61 N. Y., 52; *Coleman* v. *Eldred,* 44 Wis., 210. See 3 Wash. Real Prop. (6th Ed.), secs. 1981 to 1986, for observations reaching all phases of this case. The legal title is conceded to be in appellee. The claim that this legal title is held in trust for appellant cannot be sustained on the facts in this record. There were no visible acts of ownership by appellant, and its possession was, if it had any, not even exclusive. Appellee was certainly in joint, if not exclusive, possession of the southern part. A mixed possession is not enough to warrant disturbance of the record rights of innocent purchasers for value. *Billington* v. *Welsh,* 6 Am. Dec., 406; *Bell* v. *Twilight,*

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Statement of the case.

45 Am. Dec., 367; *Boyce* v. *McCulloch*, 39 Am. Dec., 35. There was no such change of ownership of the land in controversy as to "arrest the attention" of purchasers. *Stevens* v. *McGee*, 81 Miss., 644; 33 South., 73.

Affirmed.

JOSEPH WATT FUGATE v. STATE OF MISSISSIPPI.

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1. CRIMINAL LAW. *Jurors. Competency. Code* 1892, § 2355.

Under code 1892, § 2355, providing that any person otherwise competent who will make oath that he is impartial shall be competent as a juror in any criminal case, although he has an impression or opinion as to the guilt of the accused, if it appear to the court that he has no bias and no desire to reach any result except that to which the evidence may conduct, the oath of the proffered juror is not conclusive, nor is he the judge of his own competency.

2. SAME.

A person is not qualified as a juror:

(*a*) Who has an opinion about the case and cannot say positively that he can try the case as though he had none; or

(*b*) Who has an opinion about the case and from what he knows could bring in a verdict (other than one predicated of a want of further knowledge) without further evidence; or

(*c*) Who has an opinion about the case which it would require strong testimony to remove.

FROM the circuit court of Prentiss county.

HON. EUGENE O. SYKES, Judge.

Fugate, appellant, was indicted, tried and convicted of murder in the court below and appealed to the supreme court. The facts upon which the decision is based are fully stated in the opinion of the court.

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Brief for appellant.

J. M. Boone, B. A. Selman, Samuel P. Allen and *Candler & Candler,* for appellant.

If we are to stand by the splendid enunciation of Justice Stockdale upon the subject of a fair and impartial trial, as delivered by him in the case of *Jeffries* v. *State,* 74 Miss., 675, in which cause the disqualification of one juror was involved, then it inevitably follows under the principles enunciated in that case that where five jurors failed to measure up to the standard as to impartiality required by law, the result can only be a reversal of the case.

In *Cannon* v. *State,* 57 Miss., 147, the expressions of the juror was no stronger against the defendant than the statements of these jurors. Undoubtedly the above jurors had prejudged this case favorably to the defendant, and for that reason alone a new trial was granted in the Cannon case.

In *Brown* v. *State,* 57 Miss., 431, this court, speaking through Judge George, said: "The intention of the law is that the juror shall come to the consideration of the case unaffected by any previous judgment, opinion or bias, either as respects the parties or the subject-matter in controversy." . . . This cannot be, if a juror has a fixed and settled opinion on the subject-matter in controversy, or as to so much of it as would materially affect his judgment on the whole. As a general rule, the inquiry in a criminal case is as to the state of the juror's mind on the question of the guilt or innocence of the accused. If he has a fixed opinion on the subject, he is excluded, because he goes into the jury box with an opinion either for or against the prisoner, which must, according to the laws of the human mind, operate as a substitute for evidence. We know that, where a fixed opinion is thus entertained, the natural tendency of the mind is to seek for that in the evidence which will tend to confirm it, and to weaken or explain away the evidence which is against it. The mind is not, therefore, free to act on the evidence." Tested by this rule, each of the five jurors were clearly incompetent.

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Brief for appellee.

In *Mabry* v. *State,* 71 Miss., 721, the court pronounced the juror, Hyman, incompetent, because he had a fixed and definite opinion and would not say positively whether he could try the case as though he had no opinion.

It will be observed that most all of the jurors above complained of would not say positively whether or not they could give a fair and impartial trial, and would not say positively that their opinion would not embarrass them in rendering a verdict, and clearly, under the Mabry case, *supra,* all five of the jurors now under consideration were incompetent.

In the Klyce case, 79 Miss., 652, the court enforced the idea of liberal interpretation in favor of the accused, as shown in § 2355 of the code on this subject. In that case the court declined to hold a juror who had an opinion competent, merely because he stated he could try the case impartially, for the reason that the juror may so state and may think so, but it is for the court to say whether he in fact would so try the case, in the light of the weakness of human nature.

While it is true that the court in the Klyce case seems to base its reversal upon the fact that the juror heard the facts from the state witnesses, yet, it does not negative the idea that this opinion formed from talking to persons who talked with the state witnesses would not equally render the juror incompetent. The juror, Browning, in the case at bar, stated that parties who heard the witnesses testify in the court had told him of their statements. Several of the other jurors complained of stated that they did not know whether the parties who talked to them were witnesses or not, and for all we know, they might have been witnesses.

William Williams, attorney general, for appellee.

It is submitted that the jurors mentioned in the first, second, third, fourth, and fifth assignments of error, were competent jurors under the statute and adjudications of this court. Each and every one of them testified that he had no bias or feeling or

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prejudice in the case, and no desire to reach any result in it, except that to which the evidence might conduct.

The competency of a juror is a matter that is left largely to the sound discretion of the trial judge. By reference to the record in this case and to Klyce's case, 79 Miss., 652, it will be seen that there is a wide difference between the two cases, in this: In Klyce's case the juror had heard the testimony from the state witnesses, and said that he had an opinion. His opinion was not based on rumor, as the opinion of the jurors referred to in the present assignment of error. The jurors mentioned in the assignments of error above referred to, said that they had an opinion, which was based upon rumor, but that it would readily yield to testimony in the case, and that the opinion they had would not in any way embarrass them after hearing the law and testimony in the case in rendering a verdict, and that they would feel free to sit in the jury box and render a fair and impartial trial.

The ruling of the trial court as to the competency of the above named jurors does not conflict with the holding of the court in Klyce's case.

Argued orally by *J. M. Boone,* for appellant, and by *William Williams,* attorney general, for appellee.

PRICE, J., delivered the opinion of the court.

The defendant was tried at the August term, 1902, of the circuit court of Prentiss county, for the murder of Ransom Cunningham, was convicted and sentenced to be hanged, and appeals to this court.

Assignments of error 1 to 5, inclusive, go to the competency of Jurors Randall, Kinard, Browning, Pinson and Waters. At the very threshold of this case we are met with the proposition, were the above-named jurors competent? If this question be decided in the negative, then it would be useless to notice any other of the numerous assignments of error. The proposed

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Opinion of the court.

Juror Randall, upon his *voir dire,* after stating that he had some opinion of the guilt or innocence of the accused, and that it would take evidence to remove it, was asked by defendant's counsel: "If you heard no more facts about the case, you would be prepared to decide the case as you now stand?" "Yes, sir." Juror Kinard, upon his preliminary examination, after stating that he had an opinion from what he had heard, was asked: "If you were not told anything more about it, and the court was to tell you to go out there and bring in your verdict, could you go out there and pronounce him guilty or not guilty?" "Yes, sir; I would think him guilty of the killing." By the court: "Would that opinion, which you say is based on rumor, embarrass you in any way when it came to rendering a verdict in the case after hearing the testimony and the law?" "I think not." The proposed juror Browning, on his examination, after stating that he was in Booneville during the eight days the *habeas corpus* trial was in progress, and was not around the courtroom at the time, except two or three times, and that he had formed an opinion from rumor of the guilt of the defendant, was asked: "Were they discussing it with you and in your presence?" "Sometimes it was being discussed with me." "They would tell you the facts as they understood them?" "Yes, sir." "Did you believe what they said about it?" "Yes, sir." "You still have that opinion?" "Yes, sir." "Are you prepared, if you heard no more about it, to render a verdict in this case?" "I don't think I am." "Did these parties tell you what they heard the witnesses say up here in the court house?" "Yes, sir." "You say it would take evidence to remove that opinion which you now have?" "Yes, sir." Juror Pinson, after stating that he had heard of the case, and heard people talk of it, was asked: "Did what they told you make any impression on your mind as to how the killing occurred?" "Yes, sir; it did on one side." "Did it not impress you on the other side?" "No, sir." "You formed your opinion from one side of the question?" "Yes, sir." "You still have that opinion?" "Yes,

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sir." "Would it take testimony to remove it?" "Yes, sir." "Pretty strong testimony?" "If I could hear the testimony, I could tell you more about that." "You would have to measure the weight of it yourself?" "Yes, sir." "Are you pretty well fixed about your opinion of things, when you hear statements—do you stand by your opinions pretty well?" "Yes, sir." "You are on one side of the case now?" "Yes, sir." "You don't know the people who are witnesses—are any who told you about it witnesses?" "No, sir." "Your mind is made up, and will stay that way until testimony changes you?" "Yes, sir." Juror Waters, upon his preliminary examination: "You have a decided opinion whether he is innocent or guilty of the charges, from what you have heard about the case?" "I can't say whether I have or not; I just have a firm opinion." "You have a firm opinion on one side of the case now?" "Yes, sir." "It would take plain and positive testimony to remove that opinion?" "Yes, sir." "Your opinion is such that slight evidence would not remove that opinion?" "No, sir." "It would take pretty strong evidence to remove that opinion." "Yes, sir." Each of the proposed jurors was asked by the court: "If, notwithstanding you have an opinion in the case, would that opinion embarrass you in any way if you were permitted to sit in the jury box?" and they answered "No"; each disclaiming bias, and saying they were impartial. The court pronounced each of said jurors competent, over the defendant's exception, and they were challenged by the defendant peremptorily, and the twelve challenges allowed defendant were exhausted.

Section 2355 of the code of 1892 does not mean that the mere fact that a proposed juror makes oath that he is impartial shall be conclusive of that fact. That section was intended to prevent the exclusion of a proposed juror on the mere ground that he had an impression or an opinion. Having such impression or opinion, he should not be summarily excluded, if he would make oath that he was impartial. But, the oath made, it is at last, by the statute, referred to the judgment of the circuit

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judge whether the juror is in truth and fact impartial, as to which the circuit judge will determine from all the evidence addressed to that point. He may, from all the evidence, hold him impartial, though he has an impression or an opinion. These opinions or impressions producing no fixed conclusion, leaving the proposed juror without bias of feeling or prejudice, and with the desire to reach only the result to which the evidence should conduct, are not enough to disqualify. But a settled opinion arising from rumor, from discussing the facts of the case with others, from hearing the witnesses' account of the testimony, and not knowing whether such proposed juror could ignore his opinion, being on one side of the case, with convictions that would require strong and positive evidence to remove, does disqualify a proposed juror. Most men, upon being asked by the trial judge, would answer that they could try a case impartially, notwithstanding an opinion. Few would answer—though, unconsciously to them the fact might be—that they had a desire to reach a verdict to which the evidence did not conduct, although their minds were so fixed, biased, or prejudiced as to easily reach a verdict to which the evidence did not logically conduct. Such is the constitution of the human mind, such the frailty and imperfection of human nature, that one could hardly be expected to declare himself controlled by bias or prejudice when under oath. And perhaps the more honest the man, the more solemnly would he assert his freedom from both. It is for the circuit judge, in view of all the evidence, knowing the tendency of human nature, to satisfy himself, in the language of the statute, that the proposed juror is impartial. He must be satisfied. He should not, in the case of doubtfully balanced competency, give the state the benefit of the doubt. It is his duty to see that a fair, competent, and impartial jury is selected to try every case.

In this case there was manifest hesitancy and distrust displayed on the part of some of the proposed jurors themselves. The law and the evidence would have effect upon such jurors.

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Opinion of the court.

How much—just some, or controlling effect? If a juror has an opinion, and will not say positively that he could try the case as though he had none, he is not a competent juror. As said by this court, speaking through Justice Stockdale, in *Jeffries* v. *State,* 74 Miss., 677; 21 South., 526, it would be placing too low an estimate upon the lawmaking power to say that it intended to remove or infringe upon the safeguards of the lives and liberties of the people, to authorize the trial of one charged with crime by a partial or prejudiced jury; jurors with convictions so strong as to enable them to bring in a verdict without other evidence, or with an opinion that would require strong and positive evidence to remove it, especially when the law is that the evidence should be so cogent and conclusive as to exclude from the mind of the jury every reasonable doubt of guilt. The defendant is never called upon to produce strong evidence of his innocence, but he has answered the law's demands when there arises out of the evidence, or from lack of evidence, a reasonable doubt of his guilt.

As we answer the proposition proposed in the negative, it becomes unnecessary for us to notice any other of the twenty-four errors assigned.

The judgment of the lower court is reversed, and the cause is remanded.

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Statement of the case.

FIRST NATIONAL BANK OF WEST POINT *v.* ABRAHAM BLOCH ET AL.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 158. *Chancellors. Interchange. Code* 1892, § 458.

Code of 1892, § 458, authorizing chancellors to alternate and make temporary exchanges of their districts, is constitutional, although by constitution of 1890, sec. 158, the legislature is expressly authorized to provide by law for the interchange of circuit judges and there is no like constitutional provision respecting chancellors.

2. CHANCERY COURTS. *Adjourned terms. Code* 1892, § 913.

Where the chancellor, as authorized by code 1892, § 913, directed the clerk to adjourn the regular term of the court to a designated day, and he did so, a decree, in a suit pending on the first day of the regular term, rendered on the day to which the term was ajourned was not rendered at a special term of the court, but at an adjourned term.

FROM the chancery court of Attala county.

HON. STONE DEAVOURS, Chancellor.

The appellees, Abraham Bloch *et al.*, were complainants in the court below; they obtained a personal decree for a considerable sum of money against their debtor, one Colbert. This decree remained unsatisfied for some time, when complainants sued out a writ of garnishment against the appellant, the First National Bank of West Point, returnable on the first Monday of February, 1902, the first day of the regular February term of the chancery court. The term was limited by law to six days. The chancellor was not present on the day fixed by law for the beginning of the term, but had ordered the clerk of the court, in writing, to adjourn the court, on the first Monday in February, until the 13th day of the month. The clerk, in pursuance of the written order given by the chancellor,

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Brief for appellees.

entered an order on the minutes of the court on the first Monday in February adjourning the court until the 13th day of the month. On the 13th of the month the chancellor of the district did not appear, but the Honorable Stone Deavours, a chancellor of another district, did appear and opened court and proceeded with business, presiding by interchange with the chancellor of the district. The bank did not appear and did not answer the writ of garnishment which had been duly executed upon it and a decree for want of an answer was rendered against it for the full sum due complainants on their personal decree against Colbert upon which the garnishment was based. The bank, appellant, appealed therefrom to the supreme court.

Roane & McClellan and *R. C. Beckwith,* for appellant.

The jurisdiction of the court is fixed by the constitution, and cannot be altered by the legislature. When express provision is made for circuit judges interchanging and none for the chancellors, it must be apparent either that the chancellors have no jurisdiction to interchange or else that the provision allowing circuit judges to interchange was a piece of useless verbiage, and this is directly opposed to our general understanding of the object and effect of a written constitution.

J. A. P. Campbell, for appellees.

The term of the chancery court commencing first Monday of February, was, by written order of Chancellor Byrd, adjourned by the clerk in strict conformity to § 913 of the code, and all were bound to take notice and act accordingly, and Chancellor Deavours presided by interchange, as provided for by § 458 of the code.

Everything triable or which could be done during the week beginning on the first Monday of February was triable during the adjourned term, the same term continued according to law to the next week.

Argued orally by *J. A. P. Campbell,* for appellees.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

We decline to hold unconstitutional § 458 of the code, authorizing chancellors to alternate in the public interest, merely because the constitution is silent as to that, but express that circuit judges "may interchange circuits in such manner as may be provided by law." Without this provision, we think the legislature would have the power to provide for the interchange, and so it may, as to chancellors.

Under the constitution of 1817 there was organized but one system, that of superior courts, where the judges held for districts, but sat in *banc* on appeals or writs of error, and this provided that the judges might interchange.

The constitution of 1832 gave circuit courts full jurisdiction both of law and equity matters, and provided for no district chancellors, but provided for interchange of circuit judges. The constitution of 1869 retained the clause in its place as to circuit judges, but omitted it as to chancellors, and so it crept into that of 1890. We think it was competent for the legislature to pass the act of interchange under either constitution, but it has been on the statute books too long, and too long acted on to be disturbed now. It was there, and had been acted on for years, when the constitution of 1890 was ordained.

The term of court where the proceedings complained of were had was in no sense a special term, but an adjourned term under code, 1892, § 913. The other assignments of error we regard as important only as evincing the ingenuity of learned counsel. We cannot announce bad law from our sympathy with a hard case.

Affirmed.

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Statement of the case.

JAMES R. McDUGLE *v.* JOHN D. FILMER.

1. JURISDICTION. *Circuit Court. Foreign judgment. Costs. Amount.*

If the amount of the judgment of a justice of the peace in another state and the costs of suit therein paid by the plainiff added exceed two hundred dollars the circuit court has jurisdiction of a suit for the aggregate amount brought in this state.

2. JUDGMENT. *Tennessee justice of the peace. Collateral attack. Default. Hour of trial.*

The judgment of a Tennessee justice of the peace is not void (Shannon's Tennessee Code, § 5988), because tried on the return day of the summons and the record thereof does not show that the trial was after the hour named in the writ for defendant's appearance.

3. SAME. *Writ of enquiry. Unliquidated damages.*

A judgment of a Tennessee justice of the peace cannot be assailed where sued upon in this state because it was rendered by default upon an unliquidated demand and the record does not show the award of a writ of inquiry to fix damages as required by the statutes of Tennessee (Shannon's Code, § 4679), since by the same statutes (§ 5988) it is provided that every intendment is in favor of the validity of proceedings before justices of the peace.

FROM the circuit court of DeSoto county.

HON. PERRIN H. LOWREY, Judge.

Filmer, appellee, was plaintiff in the court below; McDugle, appellant, was defendant there. The suit was an action begun in the circuit court upon a judgment of a justice of the peace of Shelby county, Tenn. A demurrer to the declaration was overruled, the defendant declined to plead further and judgment was entered for the plaintiff, from which the defendant appealed to the supreme court. The facts are stated in the opinion of the court.

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Brief for appellee.

[For a previous suit between the parties, see *McDugle* v. *Filmer,* 79 Miss., 53.]

R. L. Dabney, for appellant.

The first ground of demurrer is, that the suit in Tennessee being for unliquidated damages, the judgment by default was interlocutory only; that the justice could have heard proof and given judgment for such sum as the proof showed the plaintiff entitled to. And, second, that under the laws of the state of Tennessee, the summons in a justice court has no return day written in it, but it is the duty of the constable to summon the defendant to appear on a day, and at an hour, to be set out in the return. The certified copy shows the defendant was summoned for a day, and for 2 o'clock on that day, while the record fails to show that the hour named had arrived when judgment by default was rendered.

The third ground of demurrer is, that the Tennessee judgment being for $200 only, the circuit court had not original jurisdiction of the subject-matter, the costs in Tennessee being no part of a plaintiff's recovery. That is, their courts hold that where a defendant pays a successful plaintiff the amount of his judgment and the costs, that the officers of the court can have an execution issued against the defendant if the plaintiff fail to pay the costs he has collected over to them, and this was once the view of the appellee; for *McDugle* v. *Filmer,* 79 Miss., 53, is this same case begun in a justice court in Mississippi on this same judgment.

S. John Waddell, for appellee.

As to the second ground of the demurrer, that the suit in the court below was only for $200, it is only necessary to call the attention of this court to the declaration in the case where it is explicitly stated that appellee sued and demanded judgment for the $200, for which he had received judgment in Tennessee and the $2.15 costs paid by him in obtaining that judgment,

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Brief for appellee.

making a total of $202.15, and that this amount was in excess of the jurisdiction of a justice of the peace in this state and therefore the suit was properly brought in the lower court. As to the third ground of demurrer, an examination of the transcript of the record from the court of the justice of the peace shows that the summons upon which the judgment was rendered was returnable at 2 o'clock P. M., January 9, 1900, and the judgment was regularly rendered by said justice of the peace and dated and signed on that day, and counsel for appellant can cite no authority to this court showing that the justice of the peace in Tennessee was required to note the particular hour on which judgments are rendered by him. This question, like the one raised upon the first ground of demurrer, is a question of procedure by the justice of the peace in arriving at the judgment rendered by him, and is one, which, under both the statute law of the state of Tennessee and by the authorities generally, every intendment and presumption is in favor of the regularity and validity of such judgments, and they cannot be attacked in a collatteral procedure for mere errors of this kind.

By appellants' first ground of demurrer, that the judgment sued on was an interlocutory and not a final judgment, he is relying upon sec. 5968 of Shannon's Code of Tennessee, which provides that "If the defendant does not appear at a trial before a justice of the peace, the justice of the peace shall proceed to hear the allegations and proof of the plaintiff and render judgment thereon for the amount to which he shows himself entitled under the warrant." (See sec. 5968, Shannon's Code of Tennessee), and the argument is made to this court that because the judgment sued on recites simply the fact that it is a judgment by default in favor of plaintiff for $200 and costs, that it is void because it does not further show that the justice of the peace heard evidence on the claim sued on and rendered said judgment according to that evidence.

The answer to this proposition is that the judgment sued on is not an interlocutory judgment, but a final judgment, and one

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Opinion of the court.

upon which execution could have been issued immediately after it was rendered. There was nothing further to do in the State of Tennessee, so far as this judgment was concerned, except to issue execution thereon and collect the same if it could be done. This demonstrates it to be a final and not an interlocutory judgment. 2 Enc. of Pl. & Pr., 53; *Ib.* 1104 and note 3.

CALHOON, J., delivered the opinion of the court.

Filmer recovered a judgment before a justice of the peace in Tennessee against McDugle by default, on proper service of summons, for $200 and costs, and he paid the costs, $2.15, and then sued McDugle in Mississippi, in a circuit court, for the $202.15. The circuit court had jurisdiction. The costs, added to $200 recovered, constituted a debt over the jurisdiction of a justice of the peace in Mississippi, and the procedure to recover this debt had to be in a circuit court.

It is urged that, because the Tennessee process to McDugle cited him to appear at 2 o'cock p. m., the judgment there should show that the trial was on or after that hour. It is also insisted that, the Tennesee suit being for "damages for failure to comply with lease contract," it was for unliquidated damages, and that therefore the judgment, reciting that it was "for plaintiff, by default, for $200," will not sustain the present action, because the statute of that state (Shannon's Code, § 4679) provides for assessment of damages when the amount of the claim cannot be readily ascertained by calculation. These contentions are unsound. It will be assumed that the justice tried the case at the proper time, and properly ascertained the damages. There was no appeal, and this is a collateral attack upon a judgment which, even if voidable, is certainly not void. Section 5988, Shannon's Tennessee Code, reads as follows: "Every intendment is in favor of the sufficiency and validity of proceedings before justices of the peace, when brought in question, either directly or collaterally, in any of the courts of the state, where it appears on the face of the proceedings that the justice

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Brief for appellant.

had jurisdiction of the subject-matter and of the parties." In the case before us the justice had jurisdiction of both. The universal rule is that, when such jurisdiction appears, the intendments and presumptions apply in favor of courts of limited as fully as to those of general jurisdiction.

Affirmed.

BRIDGET E. THURMAN v. WIRT ADAMS, STATE REVENUE AGENT.

INTOXICATING LIQUORS. *Code* 1892, § 1590. *Penalty for selling. Husband and wife. Place of business.*

A wife is not liable to the penalty prescribed by code 1892, § 1590, providing that any person who shall sell or give away intoxicants unlawfully, or allow the same to be sold or given away at his place of business, for any purpose whatever, shall be subject to pay the state, county and municipality each the sum of $500, because her husband, without her knowledge, contrary to her express orders and his promise to refrain from so doing, sells intoxicating liquors in her grocery store, although he be the general manager of her business.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

Adams, state revenue agent, appellee, was plaintiff in the court below; Mrs. Thurman, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts are fully stated in the opinion.

Anderson & Long, for appellant.

Section 1590 of the code of 1892 is highly penal. Penal statutes must be strictly construed. Such statutes cannot be so construed as to embrace cases not plainly within their letter. *Johnson* v. *State,* 63 Miss., 228; *Foote* v. *Vanzant,* 34 Miss., 40; *White* v. *Comstock,* 6 Vt., 405.

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Brief for appellee.

A principal is only liable for the act of his agent done within the scope of his authority. There is no use of citing authorities to support this proposition. It is too well settled. Even the civil liability of the principal does not extend beyond the scope of his agent's authority. Certainly the principal is not liable criminally for the acts of his agent done without the scope of his authority.

Mrs. Thurman put her means into a grocery business, and put her husband in charge of it with full authority to manage and control the grocery business as he saw fit, for her and in her name. His authority was expressly limited to the extent that he should not sell whisky. The cases of *Fullwood* v. *State,* 67 Miss., 554, and *Fahey* v. *State,* 62 Miss., 402, relied on in the court below by the state, have no application to this case. In *Fullwood* v. *State* the court decided that where liquors are sold at the bar of a boat by one apparently in charge of the bar as clerk or agent, in the absence of testimony to the contrary, the sale is to be taken as made by the owner of the bar; and in *Fahey* v. *State* it is decided that a licensed owner of a dramshop is guilty of an unlawful sale to a minor made by his clerk, even without the owner's consent or knowledge.

The difference in these cases and the one at bar is that in those cases the owner was engaged in selling liquor, while in this case the owner of the business, Mrs. Thurman, was engaged in selling groceries and not whisky. In those cases selling liquor was within the scope of the authority of the agent and therefore the principal under the law was held guilty of the unlawful sale. The scope of the authority of the defendant's husband in this case was selling and managing her grocery business, with an express agreement and limitation that he should not sell whisky.

Allen & Robins, for appellee.

It is not necessary to cite authorities to the effect that a principal is ordinarily bound by the acts of his general agent done

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within the apparent scope of his authority, although contrary to special instruction. 1 Am. & Eng. Enc. Law (2d ed.), 992; 1 Am. & Eng. Enc. Law, 1336, *et seq.*

Not only is the principal liable for the contracts of his agent, made within the scope of his authority, but for the torts of the agent done within the apparent scope of his authority, although contrary to the principals' instructions and against his wishes and without his consent or knowledge. 1 Am. & Eng. Enc. Law, 1151 and notes.

He is not only liable for ordinary damages arising out of the torts of the agent done in the scope of his authority, but he is liable for penalties inflicted by statute for such acts of the agent, although the act was done contrary to the instruction of the principal. 1 Am. & Eng. Enc. Law, 1152 and notes; *Buffalo R. R. Co.* v. *N. Y. R. R. Co.*, 23 N. Y. Sup., 303, 309. The principal is liable for the penalty of usury where his agent makes a contract for the benefit of the principal within the scope of his authority, although the principal has given instruction to his agent not to exact usury. *Rogers* v. *Buckingham*, 33 Conn., 81; *Payne* v. *Newcomb*, 39 Am. Rep., 69; *Cheney* v. *White*, 25 Am. Rep., 487. See also *Fullwood* v. *State*, 67 Miss., 554; *O'Flinn* v. *State*, 66 Miss., 7.

PRICE, J., delivered the opinion of the court.

This case presents a single question of law upon the following statement of facts: J. E. Thurman was engaged in the mercantile business in the town of Tupelo, and, while so engaged, he was indicted for the unawful sale of whisky, and tried at the August term of 1901, convicted and heavily fined, and went out of business. His stock of goods was sold for the benefit of creditors, and the appellant—his wife—purchased the same with her own money. She placed her husband, J. E. Thurman, in charge of the business as her general agent. He bought the goods, employed the clerks, signed checks, made remittances, and had general charge of the business. Appellant's

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agent bought whisky, had it shipped in his principal's name to Tupelo, placed it in the store, and sold it from his principal's place of business. About the 1st of November, 1901, there was a show in the town of Tupelo, and J. E. Thurman made on that day two or three or more sales of whisky, and thereafter the store was raided by the officers of the law, and they found about fifty gallons of whisky hid in different parts of the building, in pint, half pint, and quart bottles. On the 9th of November following, the revenue agent sued out an attachment, and it was levied upon Mrs. Thurman's stock of goods to recover the penalty pronounced by section 1590 of the code of 1892 against persons selling or allowing whisky sold at their place of business. The stock of goods so levied on was valued at $800. Mrs. Thurman, the appellant, lived about one mile from the store, and outside of the city of Tupelo, did her own housework, cared for her three small children, and rarely ever went to the store. Mrs. Thurman did not know that her husband was selling whisky or allowing it to be sold in her place of business; in fact, it is uncontradicted in the evidence that she had, before placing her husband in charge of the store, expressly forbidden him to sell whisky, and exacted of him a promise that he would not sell before she would invest her money in the business. J. E. Thurman fled the country, and did not appear to testify in this case. At the conclusion of the testimony the trial judge charged the jury peremptorily to find for the plaintiff.

Admitting that appellant did not know that whisky was being sold in her place of business, and that it was sold without her knowledge or consent, and against her positive instructions, then was this charge correct? Section 1590 of the code reads: "Any person who may sell or give away liquors unlawfully, or allow the same to be sold or given away at his place of business, for any purpose whatever, shall be subject to pay the state, county, and the city, town, or village each the sum of $500, and it shall be the duty of the sheriff or state revenue agent, or either

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to assess and collect such sums whenever he is informed such sale or gift has been made." This is a highly penal statute, and the rule of law is that it should be strictly construed.

It is insisted by appellee that the principal is bound by the acts of his general agent, done within the apparent scope of his authority, and that the principal is liable for the penalty inflicted by the statute for the acts of his agent, though done without his knowledge and contrary to his instructions. It is also contended that the principal is criminally liable for the acts of his agent in cases arising under police regulations and revenue laws, and they cite *Fullwood* v. *State,* 67 Miss., 554; 7 South., 432, and *Fahey* v. *State,* 62 Miss., 402. The general rule is that the principal is not criminally liable for the acts of his agent, done contrary to his *bona fide* instructions. In many jurisdictions, however, there are statutory provisions modifying and even abrogating this rule. But in all that line of cases (*Whitton & Ford* v. *State,* 37 Miss., 379; *Riley* v. *State,* 43 Miss., 397; *Fahey* v. *State,* 62 Miss., 402, and *Fullwood* v. *State,* 67 Miss., 554; 7 South., 432) it will be found the agent was acting within the apparent scope of his authority. The difference in the cases cited and the one at bar is that, in the ones cited, the principal was in the whisky business, and the acts of his agent in violation of law (such as a sale to a minor or an intoxicated person); but a sale by appellant's agent of whisky without her knowledge and against her expressed command was not within the apparent scope of his authority. She was in the grocery business. In that line of business where druggists have been convicted for sales made by their clerks without the knowledge of the principal, and where the sale was for other than medical, culinary, or sacramental purposes, convictions were sustained upon the ground that the druggist had legal authority to sell, but that an unlawful sale by his agent was within the apparent scope of his authority.

Certainly appellant did not sell any whisky. Did she allow it to be sold at her place of business? We find this term

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Statement of the case.

"allow" defined in volume 2, p. 152, Am. & Eng. Enc. of Law (2d ed.), as follows: "To grant, to admit, to suffer, to yield, to grant license to, to permit, to tolerate." In volume 2 of the Cyclopædia of Law & Procedure, p. 134, we find the term "allow" further defined, "to fix, to give." In Webster's International Dictionary it is defined, "to admit, to concede, to permit, to consent to." Mr. Anderson, in his Law Dictionary, defines "allow," "to approve, to sanction, to permit." We have been unable to find, in any of the books, any definition of the term "allow," which does not imply knowledge or consent. We are, therefore, of the opinion that the peremptory charge to find for the plaintiff was error.

Reversed and remanded.

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KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY v. CALVIN S. D. HAWKINS.

RAILROADS. *Dog seen on track. Duty of engineer. Carelessness. Wilfulness.*

If the engineer of a railroad train saw, or should have seen, a bloodhound trailing along the track a short distance in advance of the train, and having time to do so, does not give warning or do anything to prevent his engine from striking the animal and thereby causes it to be run over and killed by the train, his carelessness amounts to design and the railroad company will be liable to the owner for the value of the dog.

FROM the circuit court of Marshall county.

HON. PERRIN H. LOWREY, Judge.

Hawkins, appellee, was plaintiff, and the railroad company, appellant, was defendant in the court below. From a judgment in plaintiff's favor for $450 defendant appealed to the supreme court.

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Brief for appellant.

The evidence was, in substance, as follows: Plaintiff was employed by the sheriff of Marshall county, Miss., from whom some prisoners had escaped, to trail them up with his dog. At the time plaintiff's dog, a valuable, well-trained bloodhound, was killed, there were two men and two other dogs along with plaintiff and his dog. They had trailed the prisoners down the railroad track, going west nearly one thousand yards, and were in a cut, and there was also a curve in the railroad before it reached the curve extending through the cut. Just before the train that killed the dog passed, which was a freight train, a passenger train passed them, and it blew its whistle, and the men all got off the track, and took the dogs off; but this freight train ran upon them very fast and gave no warning of any kind, no whistle was blown, and the bell was not rung. The men were all walking along the track together, and one dog was on the track about ten feet ahead of them, and plaintiff's dog was nearly thirty feet ahead. The first thing that gave any warning of the approaching train was the flash of the headlight, when one of the men said, "Lookout, here comes a train," and all of the men at once got off the track, and the nearest dog was reached and gotten off the track, but there was not time enough to get to the dog that was killed. The engineer and fireman both testified that they did not know any dog was killed, and that the bell was not rung, and the whistle was not blown. The engineer testified he was keeping a strict lookout, and did not see the men or the dogs. The fireman did not recollect what he was doing.

J. W. Buchanan, for appellant.

The court, in *Mobile, etc., R. R. Co.* v. *Holliday,* 79 Miss., 294, in discussing the liability of railroad companies for killing dogs, says:

"Of course these observations do not apply where a dog was purposely run down, or where he was seen in such a cut as prevented escape, or where the dog was seen and the negligence was so gross as to be tantamount to design."

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Brief for appellee.

In the case at bar, as the dog was not seen, there could not have been any purpose to run him down and kill him. From the width of the cut and the space on either side of the track to the embankment, there was nothing to prevent the dog from escaping the engine. It is undisputed that the dog was not seen, and it cannot be said that it was negligence in failing to see him, much less such gross negligence as to be tantamount to design.

Alexander & Alexander, for appellee.

The only defense set up is that the engineer and fireman did not see the crowd of men and dogs. We can safely rest this case on the testimony of the engineer and fireman themselves. They testified that the dog was killed in a cut 180 yards long, through which the track makes a very gradual curve. It is true they say they did not see the dog, but they do not testify that they were occupied with lubricating the engine or adjusting valves, etc.

The engineer very candidly admitted that he does not know whether or not he was on the train that killed the dog. If he was he never saw the dog nor the men, but while sitting bolt upright on his seat, and on a sharp lookout, he plowed through this crowd of men and dogs without seeing them. His powers of vision were very much like those of Sam Weller at the Pickwick trial. The engineer testified as follows: "State whether you were on the lookout." "Yes, sir, I always look ahead unless it is for a second or two at a time." He says that if the men had been on the side of the track he could certainly have seen them. As a matter of fact, the men were on the side of the track when the engine passed. There was a great deal of testimony as to the engineer's vision being obstructed by the boiler head, etc., but this is immaterial, for the fireman was at the opposite window and he has no recollection of what he was doing at the time. He says that he could not tell whether he was on the lookout at the time or not. "I don't

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know what I was doing then." Since the burden of proof was on appellant to show due care it is not met by such negative testimony. The cases in which our court has held that the presumption of negligence was overcome are cases where the engineer and fireman knew and testified positively what they were doing at the time. It would practically abolish the presumption of negligence if it is held to have been overcome, where the engineer and fireman testify that they have no recollection of what they were doing at the time. But, not only does the testimony of the engineer and fireman come short of overcoming the presumption of negligence, but it positively establishes negligence. It would be negligence for both the engineer and fireman to avert their eyes from the track and both, in the absence of any accident to the engine, to turn their attention to the engine as the train was entering a long cut in a curve of the track. Surely, if there is any time in which a regard for human life, the safety of the crew and passengers, as well as of persons or property on the track, would call for the utmost care, it would be when a fast running train was rounding a curve in a long cut. We do not hesitate to say that it would be the grossest negligence if both the engineer and fireman failed to keep a lookout under such circumstances. There is at all times a possibility of obstructions on the track, of persons or animals being on the track, and the presence of the curve and the cut on this steep down grade would make it all the more important to keep a sharp lookout. It is quite evident that the jury did not believe the engineer and fireman when they stated that they did not see the men and the dogs. It is inconceivable, if both were in positions and on the lookout, that they could have failed to see them. It is certain that there were three men, two of them holding dogs, and all on the side of the track, and they were surely seen by either the engineer or fireman, if not, the engineer and fireman were either grossly inattentive or grossly negligent in both attending to some other matter at the time, or they are testifying to an improbability

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Statement of the case.

and the jury did not believe them. It is not denied that it was a bright, moonlight night, and no headlight was necessary to see the men and the dogs.

Argued orally by *C. H. Alexander,* for appellee.

CALHOON, J., delivered the opinion of the court.

If the engineer was on the lookout, as he says he was, in coming around a curve debouching into a cut, he must have seen the men and dogs. The jury manifestly thought either that he did see them, or should have seen them by proper lookout, in entering so dangerous a piece of road. There is no pretense that he was engaged about his engine. One toot of his whistle would, in all probability, have prevented the damage. From the evidence the jury must have thought he did see, and, in that case, the carelessness was "so gross as to be tantamount to design." *Mobile, etc., R. R.* v. *Holliday,* 79 Miss., 297; 30 South., 820, does not apply to the facts here.

Affirmed.

PETER OHLSON ET AL. *v.* ROBERT W. DURFREY.

1. MANDAMUS. *Distinct rights. Joint petition.*

Two or more distinct rights cannot be joined in a petition for mandamus to enforce them.

2. WITNESS. *Right to certificates.*

The rights of two or more witnesses in the same case to have certificates of their attendance issued to them are distinct and not joint.

FROM the circuit court of Madison county.

HON. ROBERT POWELL, Judge.

Mandamus by Ohlson and another, appellants, against R. W. Durfrey, circuit clerk of Madison county, to compel the issuance

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Opinion of the court.

to relators of certificates for their attendance as witnesses in the circuit court of Madison county. The petition alleged that petitioners were duly summoned as witnesses in a certain case, named, while they were in Madison county, where the court was held, and that they afterwards attended the trial one day, and duly proved their attendance, but that the clerk, appellee Durfrey, refused to issue a certificate of such attendance, including their mileage. On the trial, defendant moved to dismiss on the ground that two distinct demands of two different persons were joined in the same petition, which motion the court sustained, and plaintiffs appealed to the supreme court.

J. B. Chrisman, for appellants.

H. B. Greaves, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

(See *Haskins* v. *Board of Supervisors,* 51 Miss., 409, and vol. 13, Enc. Pl. & Prac., p. 646.)

Affirmed.

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Statement of the case.

JAMES L. BIGNER v. JAMES HODGES.

1. SLANDER. *Allegata and probata. Variance.*

An allegation in a declaration for slander that defendant had falsely spoken and published of and concerning plaintiff, a butcher, that he, the plaintiff, "had butchered and sold to his patrons a steer affected with a loathsome disease and which at the time had a running sore or cancer on its leg," is supported by testimony showing that defendant had so spoken and published of and concerning plaintiff, the following words: "He had butchered and sold a steer which was unfit for use, because it had a running sore on its leg," and the variance was immaterial.

2. SAME. *Privilege communication. Statements to officers.*

Statements causually made to officers, not for the public good, which were also made to other persons, are not privilege communications.

FROM the circuit court of Lincoln county.

HON. ROBERT POWELL, Judge.

Hodges, appellee, was plaintiff, and Bigner, appellant, was defendant in the court below. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The suit was for slander. On the trial the evidence was to the effect that both Bigner and Hodges were butchers in the village of Norfield, and that Bigner had been offered a steer for beef by one Williams, and that Hodges, some days after that bought the steer from Williams and butchered it, and sold it in the market in Norfield, and that Bigner went to the mayor, Osborn, and the marshal, Camel, and said to them, that "Hodges had butchered and sold to his patrons a steer which was unfit for use, because it had a running sore on its leg"; that Bigner asked the mayor and marshal to go and look at the hide, which they afterwards did, and found that there had been a sore on the animal's leg, but it had entirely healed when the steer was butch-

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Brief for appellant.

ered by Hodges. After plaintiff had rested, defendant moved to exclude the evidence, because there was a material variance between the allegations of the declaration and the proof. Plaintiff then asked leave to amend his declaration by striking out the words, "plaintiff had butchered, and sold to his patrons a steer effected with a loathsome disease, and at the time it was butchered, had a running sore or cancer on its leg," and insert, "Jim Hodges (meaning plaintiff) has butchered a beef and sold it to the people that was not fit for use, because it had a running sore on its leg." The court allowed plaintiff to make this amendment. There was also proof that defendant made similar statements of the condition of the steer to other persons besides the mayor and marshal of Norfield. Defendant made a motion to exclude all the testimony of the plaintiff because there was a material variance between the allegations of the amended and the original declarations and the testimony on the part of plaintiff, and because plaintiff's testimony shows that the statements made by defendant were privileged communications. The court below overruled this motion.

A. C. McNair, for appellant.

The words proven to have been spoken were not the exact words alleged, nor are they synonymous. They must be the same or synonymous words. It is not sufficient that the same general idea is conveyed. The variance was fatal and the motion should have been sustained, and a judgment rendered for the defendant. *Jones* v. *Edwards,* 57 Miss., 28; *Furr* v. *Speed,* 74 Miss., 423; 13 Am. & Eng. Enc. Law, 478, 480 and notes.

A qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. Cooley on

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Brief for appellee.

Torts, 217; Addison on Torts, sec. 1091; 13 Am. & Eng. Enc. Law (1st ed.), 411.

Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication. 13 Am. & Eng. Enc. Law (1st ed.), 416, 417.

Privileged communications constitute an exception to the general law relating to libel and slander, and for the reason that they are presumed not to be malicious. If they are spoken on a just occasion, the communication is privileged, and express malice must be shown in order to maintain an action. If the circumstances making the communication a privileged one appear upon the plaintiff's own showing, or in the testimony of his witnesses, as a part of his case, then he must prove express malice. *Jarnigan* v. *Fleming,* 43 Miss., 710.

H. Cassedy, for appellee.

The words proved, to say the least of it, are synonymous to the words alleged, as they convey the same specific idea, the same identical thought, and all are actionable. *Furr* v. *Speed,* 74 Miss., 423.

The witness, Tom Kit Johnson, who was not an officer, testified to the same synonymous words having been spoken to him by defendant. *Campbell* v. *Bannister,* 79 Ky., 205.

The testimony did not show that Bigner approached the mayor and marshal to lodge a complaint. The communication to Tom Kit Johnson was evidence of malice, and taken in connection with the evidence showing the soundness of the animal slaughtered, it was a question for the jury to determine whether Bigner was acting in good faith or not. Newell on Slander and Libel (2d ed.), p. 390, *et seq.; Whitney* v. *Allen,* 62 Ill., 472; *Pierce* v. *Oard,* 23 Neb., 828; s.c. 37 N. W., 677; *Garrett* v. *Dickerson,* 19 Md., 418.

The statement was not made in the course of a judicial proceeding, nor was it followed up by an affidavit.

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Statement of the case.

CALHOON, J., delivered the opinion of the court.

It is questionable whether any amendment of the declaration was needed, but, if it was, the allowance of it was proper. We think there was no material variance between the *allegata* and *probata*. The words are practically synonymous.

The doctrine of privileged communications cannot afford shelter. The mayor and the marshal were not the only persons to whom the words were spoken, and, even as to them, the defendant himself testified that he met them casually and made his statement to them. It is difficult to believe that it was for the public good he designed the communication. The jury did not believe that it was, and the verdict for $150 is not excessive.

Affirmed.

MARTHA H. LOTT v. WILSON W. PAYNE ET AL.

1. DEEDS. *Easement. Ejectment. Right of way. Possession.*

The owner of the legal title to a strip of land may maintain ejectment therefor against a defendant exercising exclusive possession thereof, although the latter have a right of way over the same.

2. SAME.

A deed to a strip of land limiting the grantees interest to "a private easement or for street purposes only," does not authorize the grantee to take exclusive possession of the land.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

MRS. Lott, appellant, was plaintiff in the court below; Payne and others, appellees, were defendants there. The action was an ejectment, and from a judgment in defendant's favor the plaintiff appealed to the supreme court.

The suit was brought to recover a strip of land lying between lots owned by appellant and appellees in Meridian. It was

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Brief for appellant.

agreed between the parties that the common source of title was D. C. Durham. Appellant introduced a deed from D. C. Durham to herself, conveying the strip of land sued for, and other lands adjoining. This deed was dated March 14, 1901. She then introduced her husband, who testified, describing the strip of land and how it was situated, and also as to the acts of appellees in taking possession exclusively of the strip, and rested. Appellees introduced a deed from Durham to W. D. Witherspoon, conveying, in consideration of $1,500, some lands adjoining the strip sued for, dated November 9, 1892. This deed contains the following recital: "For and in consideration of the sum aforesaid, I also convey and warrant to W. D. Witherspoon, his heirs and assigns, the following described strip of land [here describing the land sued for]; said strip of land to be used by said W. D. Witherspoon, his heirs and assigns, as a private easement, or for street purposes." The deed from Witherspoon to appellee Payne was dated June 6, 1894. This deed, after describing this strip of land, uses these words: "Said strip or parcel of land last described, to be used by said Payne in common with the grantor as a private easement for street purposes only." The court below gave a peremptory instruction for defendants.

Neville & Wilborne, for appellant.

Appellant's contention was and is that she is the owner of the said forty-foot strip of ground, subject to the easement therein created by the deed of Durham to Witherspoon in favor of said Witherspoon and his grantees, who are the appellees; that appellees only acquired an easement in said forty-foot strip by virtue of the conveyance under which they claim, and that appellant was entitled to bring ejectment, appellees having taken exclusive possession of the property. Appellant does not dispute appellee's right to use the forty-foot strip of ground as a private street, and does not seek to interfere with appellee's right of way over said premises.

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Brief for appellee.

The phrase, "said strip of ground to be used as a private easement, or for street purposes only," were inserted before the particular description of the said strip, and form a part of the habendum clause, and limit or qualify or characterize the estate conveyed, as being merely as easement, or a right of way for street purposes over the same. It was the right of way over said strip of ground for street purposes only, that Durham conveyed to Witherspoon, not the absolute fee upon any condition subsequent as to its use, and the phrase from the deed above quoted, was such language as would naturally be employed to characterize the estate conveyed as simply an easement. *Robinson* v. *Miss. R. R. Co.*, 59 Vt., 426; Washburn's Real Property, sec. 59; *Flaten* v. *City of Moorehead*, 53 N. W., 807; *Richards* v. *Church*, 20 How. Prac., 317; *Gay* v. *Walker*, 58 Am. Dec., 734; *Fuller* v. *Arens*, 45 Vt., 400; *Mansfield* v. *Place*, 93 Mich., 450; *Winthrop* v. *Fairbanks*, 41 Me., 312; *Wiley* v. *Sirdonis*, 41 Ia., 224; *Smith* v. *Highbee*, 12 Vt., 113; *Lemon* v. *Graham*, 131 Pa., 447; *Hart* v. *Gardner*, 74 Miss., 153; *Gordon* v. *Sizer*, 39 Miss., 805; 10 Am. & Eng. Enc. Law (2d ed.), 473 and notes.

S. A. Witherspoon, for appellee.

The deed from D. C. Durham, the common source of title to the appellant, Mrs. Lott, was made in 1901, and at that time Durham was powerless to convey to the appellant any interest whatever in the land, for the reason that he had conveyed all his interest therefor to W. D. Witherspoon, in 1892. Having parted with his title, his vendee, Mrs. Lott, got nothing by the deed, under which she claims title to the land. It is very difficult to tell what sort of interest the appellant claims in the land, or what sort of interest she concedes to the appellees. If it be claimed on behalf of the appellant that she has an easement in the land, as is suggested by her effort to prove that she and her family used it as such, the double answer to this contention is, both that she did not use it exclusively for a suffi-

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Opinion of the court. .

cient length of time to confer such right, and also that she had an easement on the land, such right would not support action of ejectment. 10 Am. & Eng. Enc. Law, 474-3; *Union Canal Co.* v. *Young,* 30 Am. Dec., 214; *City of Racine* v. *Crotensburg,* 50 Am. Rep., 150.

The words in the deed by which the appellant endeavors to defeat the estate granted are the words: "Said strip of land to be used as a private easement or for street purposes."

These words, however, are manifestly words limiting the use to which the property should be put, and express no intention whatever that the vesting of the estate should depend on their use of the property, or that the divesting of the title should be accomplished by the misuse of the property. These words, as used in this deed, are very similar to the words of the deed construed in the case of *Brown* v. *Caldwell,* 48 Am. Dec., 376, in which the court held that the use of such words did not create an estate with conditions subsequent, and that the neglect or failure to use the granted premises for the purposes therein directed, did not cause a forfeiture, or revest the estate granted in the grantor or his heirs.

Argued orally by *W. H. Hardy,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

It is perfectly manifest that the language, "said strip of ground to be used as a private easement or for street purposes only," was meant to clearly limit the estate granted by Durham to Witherspoon, and by Witherspoon to appellees. *Hart* v. *Gardner,* 74 Miss., 153; 20 South., 877; *Robinson* v. *Miss. R. Co.,* 59 Vt., 426; 10 Atl., 522; *Richards* v. *The Church,* 20 How. Prac., 317, and other authorities cited by counsel for appellant. It was manifest error to refuse to reopen the case and permit Durham, the grantor, to show the whole environment—the situation of the parties and of the property at the time of the execution of the deed to Witherspoon, and at the time of

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the execution of the deed of Witherspoon to appellees. But sufficient appears from the testimony admitted to show that the parties all intended the words quoted as qualifying and limiting Witherspoon's and appellee's right to the mere easement and use of the strip in controversy as a right of way for street purposes, and that the action of all parties has conformed to this intention. The thing to be ascertained in the construction of a deed, as in the construction of any other contract, is the intention of the parties, and that intention is perfectly manifest here. Under the two deeds in evidence, appellees have the easement, but Mrs. Lott the title to the fee; and under the testimony showing that appellees have taken exclusive possession of the strip, and appropriated it as if it were their own, to the utter exclusion from it of the appellant, it is clear that ejectment was maintainable by appellant against appellees. This is expressly decided in this state in *Gordon* v. *Sizer,* 39 Miss., 805, and announced as the correct rule in the Am. & Eng. Enc. Law (2d ed.), vol. 10, pp. 473, 474.

Reversed and remanded.

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Statement of the case.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY v. JOHN T. WIYGUL ET AL.

1. NAVIGABLE WATERS. *Interstate stream. Bridges. Grant by state.*

A state may authorize the building of a bridge, wholly within its territory, over a navigable interstate stream, in the absence of congressional action touching the subject.

2. SAME. *Railroads. Power to bridge. Repairs.*

Power granted to a railroad company to build a bridge across a navigable stream includes the power to repair the same.

3. SAME. *Acts of congress. U. S. Comp. Statutes, 1901, p. 3540.*

The act of congress, approved March 3, 1899, sec. 10 (30 Statutes at Large, 1151), prohibiting the creation of any obstruction, not authorized by congress, to the navigable capacity of any waters of the United States, is prospective and was not intended to take away from a railroad company the power to repair a bridge, built by it over an interstate stream under a grant from the state.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Wiygul and another, appellees, were plaintiffs and the railroad company, appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The Tombigbee river is a navigable stream, running through Mississippi and Alabama. The defendant railroad company, in repairing its bridge across this stream, obstructed to some extent the channel with pilings. Plaintiffs were engaged in floating rafts down this river, and their rafts were torn to pieces by the obstructions, and they lost some logs. This suit was brought by plaintiffs to recover from defendant the value of the logs so lost by them. The opinion of the court contains a further statement of the facts.

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Brief for appellant.

J. W. Buchanan, for appellant.

The mere grant by the state to defendant of the right to build its road, gave, of necessity, the right to construct such bridges as were essential over all intervening waterways. However, we are not driven to implication, since the company's charter grants such authority in express terms. Acts of 1886 (Miss.), ch. 192, ss. 5; *Union Pacific R. R. Co.* v. *Hall,* 91 U. S., 343.

The right to construct carries with it the right to maintain, and of course, the right to repair when necessary. Indeed, the necessary repairing of bridges is a duty. *Central Trust Co.* v. *Wabash R. R. Co.,* 32 Fed. Rep., 566.

If the defendant had the right to repair, clearly it was not liable unless it was guilty of an improper exercise of the right. If, in making repairs, it used diligence and care, "having in view the interest of those using the river, as well as the safety of the public," and placed no obstructions in the river except as were necessary, the damage to navigators resulting therefrom, if any, was *damnum absque injuria. Hamilton* v. *Vicksburg, etc., R. R. Co.,* 119 U. S., 285; *Ib.,* 34 La. Ann., 973; *Central Trust Co.* v. *Wabash, etc., R. R. Co.,* 32 Fed Rep., 566; *Cantrell* v. *Railway Co.,* 90 Tenn., 638; *Ward* v. *Louisville, etc., R. Co.,* 3 Am. & Eng. R. Cas., 506; *Green Nav. Co.* v. *C. & O. R. R. Co.,* 88 Ky., 1.

It is too well settled now, by the highest authority, to admit of question, that the state of Mississippi had power and right to confer such authority upon the company. *Hamilton* v. *Vicksburg, etc., R. Co.,* 119 U. S., 280; *Green Nav. Co.* v. *C. & O. R. Co.,* 88 Ky., 1; Wheeling Bridge Case, 18 How. (U. S.), 432; *Gillman* v. *Philadelphia,* 3 Wall. (U. S.), 713, 729; *Hamilton* v. *Vicksburg R. Co.,* 119 U. S., 282.

The different acts of congress referred to by counsel for appellee have a proviso, providing that the section enacted did not apply to any bridge, bridge draw, bridge piers . . . which had been duly authorized by law.

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Opinion of the court.

W. H. Clifton, for appellee.

[Mr. Clifton's brief was lost, misplaced or withdrawn from the record before it reached the reporter.]

Argued orally by *J. W. Buchanan,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The legislature of this state granted the appellant a charter (acts 1886, ch. 123, p. 192 § 2, ss. 5), by which appellant was authorized to construct the bridge in question over the Tombigbee river, which is an interstate stream, a navigable river of the United States. At the time this charter was granted, and until after this bridge was constructed, congress, which has the supreme power to control the navigation of such rivers, had not acted with respect to this river. It is well settled that as to such rivers, in the absence of congressional legislation, the states may authorize the construction of bridges over them. Wood on Nuisances, sec. 596, *et seq.;* Gould on Waters, sec. 130; *Hamilton* v. *Vicksburg,* 7 Sup. Ct., 206; 30 L. Ed., 394, with Rose's notes appended thereto, showing the subsequent citations of the case; Am. & Eng. Enc. Law (2d ed.), vol. 4, p. 923, which last states the rule thus: "It is a well-established doctrine that, subject to the exercise of the power of congress to regulate navigation, a state has the power to authorize the building of bridges over navigable and tide waters, although such bridges may, to some degree, obstruct navigaton." It is also thoroughly settled that power to bridge a navigable stream includes the right to make repairs. Gould on Waters, sec. 135, p. 267, note 5, and all authorities therein cited, especially *Rhea* v. *Newport News R. R. Co.* (C. C.), 50 Fed., 16, and *Hamilton* v. *Vicksburg, supra; Williamette Bridge Co.* v. *Hatch,* 8 Sup. Ct., 811; 31 L. Ed., 632; *Adams* v. *Ulmer,* 91 Me., 53; 39 Atl., 347. It became necessary, in 1900 and 1901, for the railroad company to repair its bridge, which it proceeded to do. Previously to the repairing of the bridge there was an 80-foot space between

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Opinion of the court.

the piers, through which logs could be floated. The railroad, in repairing, found it necessary to remove the center pier, so as to keep it in the center of the channel, the channel having changed from its old position on account of a sandbar which had formed on the east side, and forced the current to the western shore. In constructing this center pier it became necessary to build a cofferdam of such size that it left a channel of only 40 feet for the floating of logs. There is ample testimony on the part of the railroad that this change was absolutely essential, and that the work was done by competent, skilled men, and in a proper manner in every way; and that the obstruction only continued during such space of time as was absolutely necessary within which to complete the repairs.

Counsel for the appellee obtained from the court the following charges: "If the defendant drove piling in the channel of the river, which materially interfered with the use of the stream for the purpose of rafting, then they will find for the plaintiff, although defendant drove piling in the river for the purpose of repairing its railroad bridge. (3) The court charges the jury that if the defendant, in repairing its railroad bridge, placed obstructions in the river which materially interfered with the use of the river for public passage of rafts made of logs cut from lands through which the river passes, then it is liable for all damages caused by said obstructions, and the jury will find for the plaintiff." And the court refused to the defendant the following charge: "The court charges the jury for the defendant that the railroad company had a right, for the safety of the traveling public and its bridge, to make the necessary repairs to its bridge; and in doing so, the company is only required to construct the same in a reasonable, proper, and skillful manner, having in view the interest of those using the river as well as the safety of the traveling public and its own property; and if the jury, from the evidence in the case, believe that the work done by the defendant on its bridge and in the river was done in a reasonable and skillful and proper manner, they will return a verdict for the defendant."

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Opinion of the court.

Counsel for the appellee insists that no material obstruction to navigation could be placed in the Tombigbee river, because, and merely because, it is a navigable river of the United States; that is to say, that no material obstruction to navigation could be placed in the river, even to repair a bridge previously constructed under state authority, at a time when Congress had not acted with respect to such river, merely because it was a navigable river of the United States, even though such obstruction was necessary to the repair of the bridge, and the work done skillfully done, and the obstruction continued only during the time absolutely essential for the repairing of the bridge. And it is obvious that the court, in its instructions, adopted this view. Counsel for appellee cites the case of *Pennsylvania* v. *The Bridge Company,* 14 L. Ed., 249; but Congress had acted with respect to the Ohio river, and the bridge in that case, therefore, was constructed after congress had acted. See this case analyzed in Gould on Waters, sec. 129. Counsel also cites the case of the *Monongahela Navigation C.* v. *U. S.,* 13 Sup. Ct., 622; 37 L. Ed., 471; but a careful examination of that case shows that (p. 334, 148 U. S., p. 629; 13 Sup. Ct.; 37 L. Ed., 471) "there was not only the full authority of the state of Pennsylvania, but also that, as affecting that partciular lock and dam, they were constructed at the instance and invitation of congress." It would seem that the court would have sustained the construction under state authority alone, for it declares that it was done under "the full authority of the state," and the citations in the opinion (pp. 330-333, 148 U. S.; pp. 628, 629 13 Sup. Ct., and 37 L. Ed., 471) establish the general doctrine we have laid down. The fact that the court referred to the fact that the dam was constructed at the instance and invitation of congress merely shows that the court relied upon that as an added ground for decision, not that it held that, in the absence of such congressional approval, the state authority would have been insufficient. Counsel also cites the *U. S.* v. *Boom Co.,* 20 Sup. Ct., 343; 44 L. Ed., 439, which construes sec. 10 of ch.

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Opinion of the court.

425 of the acts of congress of 1899 (30 Stat., 1151; U. S. Comp., St., 1901, p. 3540), but an examination of that case shows that the court distinctly held that the language, "the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any of the waters of the United States is hereby prohibited," etc., embraces state authorization as well as congressional authorization. The court said: "As congress had not assumed such jurisdiction, either at the time of the passage of the act of the legislature of Washington, permitting the construction of a boom by the defendant, nor at the time of its actual construction, then, if it were constructed in a manner conformable to the state statute, it was 'affirmatively authorized by law,' at the time of the passage of the act of congress. It is contended by the government that this term refers to a law of congress, and does not include any law of a state legislature. We do not so construe section 10. Congress, it must be assumed, was aware of the fact that, until it acted upon the subject of navigable streams, which were entirely within the confines of a single state, although connecting with waters beyond its boundaries, such state had plenary power over the subjest of that navigation; and it knew that when, in the absence of any statute of congress on the subject, an obstruction to such a navigable river had been built under the authority of an act of the legislature of the state, such obstruction was legal, and affirmatively authorized by law, because it was so authorized by the law of a state at a time when congress had passed no act upon the subject. When congress, in 1890, passed the river and harbor bill, we think the expression contained in section 10 (26 Stat., 454) in regard to obstructions, 'not affirmatively authorized by law,' meant not only a law of congress, but a law of the state in which the river was situated which had been passed before congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances we cannot doubt was an obstruction 'affirmatively authorized by law.' When, therefore,

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the section continues, and provides that 'any such obstructions, ... whether heretofore or hereafter created,' shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an 'obstruction not affirmatively authorized by law.' If the obstructions were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was, therefore, valid."

It must be obvious that the construction of the bridge at the time it was constructed is, by this case, held to be authorized by law. It is true that section 10 of the act of March 3, 1899 (30 Stat., 1151; U. S. Comp. St., 1901, p. 3540), differs from the act construed in *United States* v. *Boom Co., supra,* which was the act of 1890, in that it has substituted for the words, "authorized by law," "authorized by congress," and, as congress had not authorized the temporary and necessary obstruction caused by the cofferdam, etc., that was (counsel says) "the creation of an obstruction," within the meaning of this section 10. We think this a misconstruction of the section. The section is prospective purely, as held in the case referred to above, and prohibits the "creation of obstructions," etc. Congress had no intention, by this section, of taking away from the railroad company, the construction of whose bridge over a navigable river of the United States had been "affirmatively authorized by law," as provided, the necessary power, embraced in and carried by the grant to construct the bridge, of making necessary repairs, provided such repairs were made with due care, and within reasonable time. Counsel's construction of this section would put congress in the attitude of requiring all bridges previously constructed over navigable waters of the United States to be removed as nuisances, or at least to remain without repair until they fell in. Acts of congress must not receive a construction which attributes folly to congress. But it is clear from previous legislation that congress always provides against such retroactive effect of legislation of this char-

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acter; for by section 7 of the act of September 19, 1890 (26 Stat., 454), as well as its amendment (section 3 of the act of July 13, 1892, 27 Stat., 110), it appears that congress, by express proviso, saved such bridges previously built from the operation of said sections, the language of the proviso being, "Provided that this section shall not apply to any bridge, draw-bridge, piers and abutments, the construction of which has heretofore been duly authorized by law."

The consideration of these acts of congress, therefore, clearly shows that congress had sedulously guarded against applying these various sections in river and harbor bills providing penalties for putting such obstructions in such navigable waters from having any retroactive application to bridges previously constructed under "affirmative authorization of law."

Counsel for appellee misconceives the power of a state, in the absence of congressional legislation, to authorize the construction of bridges over navigable rivers of the United States. He allows himself to be confused by the difference as to the law in its application to rivers wholly within a state and interstate rivers. The law is, as we have stated it above, but we quote in conclusion, to adopt as our own, the clearest exposition of the subject we have yet found—that in *Rhea* v. *New Port News Company* (C. C.), 50 Fed., 16. Judge Jackson says: "The Wheeling Bridge Case, 13 How., 518; 14 L. Ed., 249, specially relied on to support the master's conclusion, does not control the present case. It will be seen by reference to the leading opinion in the Wheeling Bridge Case that the law of Virginia, which authorized the erection of the bridge there complained of, was held to be inoperative chiefly on two grounds: First, because it impaired the obligation of the compact between Virginia and Kentucky that the use and navigation of the Ohio, so far as the territory of the said states was concerned, should be free and common to the citizens of the United States; and, second, because it was in conflict with the legislation of congress, which has expressly sanctioned said compact, and thereby made it a

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'law of the Union.' In the present case there is no such compact between Tennessee and Kentucky in respect to the Cumberland river; nor has congress, under its constitutional authority, legislated on the subject. The Wheeling bridge was of itself a permanent obstruction to navigation, while defendant's structure or false work was only a temporary and partial interruption to the usual course of navigation, with provision and arrangement made for the transfer of freight and passengers without extra charge to either, and without serious delay, risk, or danger. The question of whether the state of Kentucky had the constitutional right to authorize the erection of a bridge across the Cumberland river within its jurisdiction, and the consequent lawfulness or unlawfulness of defendant's temporary obstruction to navigation in rebuilding said bridge in order to restore its severed line, must, in the opinion of the court, be settled and determined by the principles announced in the cases of *Willson* v. *Creek Marsh Co.*, 2 Pet., 245; 7 L. Ed., 412; *Palmer* v. *Commissioners*, 3 McLean, 226 Fed. Cas. No. 10688; *Railroad Co.* v. *Ward*, 2 Black, 494; 17 L. Ed., 311; *Gilman* v. *Philadelphia*, 3 Wall., 721; 18 L. Ed., 96; *Pound* v. *Turck*, 95 U. S., 462; 24 L. Ed., 525; *Transportation Co.* v. *Chicago*, 99 U. S., 643; 25 L. Ed., 336; *Mobile* v. *Kimball*, 102 U. S., 691; 26 L. Ed., 238; *Transportation Co.* v. *Chicago*, 107 U. S., 687; 2 Sup. Ct., 185; 27 L. Ed., 442; *Miller* v. *Mayer, etc.*, 109 U. S., 385; 3 Sup. Ct., 228; 27 L. Ed., 971; *Cardwell* v. *Bridge Co.*, 113 U. S., 205; 5 Sup. Ct., 423; 28 L. Ed., 959; *Hamilton* v. *Railroad Co.*, 119 U. S., 281; 7 Sup. Ct. 206; 30 L. Ed., 393; *Huse* v. *Glover*, 119 U. S., 543; 7 Sup. Ct., 313; 30 L. Ed., 487; *Sands* v. *Improvement Co.*, 123 U. S., 293; 8 Sup. Ct., 113; 31 L. Ed., 149; *Bridge Co.* v. *Hatch*, 125 U. S., 1; 8 Sup. Ct., 811; 31 L. Ed., 629. It is not necessary to review these decisions. While they establish beyond all question the paramount authority of congress, under the commerce clause of the constitution, over all

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navigable waters of the United States, they also settle the proposition that, until congress exercises its superior right of control and regulation, the state or states within whose territorial limits such waters or streams are located may directly or through delegated authority authorize the erection of bridges across the same, and that such structures are not unlawful until so declared by congress. In respect to such structures over navigable waters within the limits of a state, nonaction by congress is not a declaration that such waters must remain free and unobstructed, but that the state's authority over the same may be exercised to the extent, at least, of permitting and authorizing the establishment of ferries, and the building of bridges over the same, necessary or convenient for either its local or interstate commerce. Navigable waters lying within the limits of a state are both state and national in their character, with a paramount right of control or regulation in the general government when congress chooses to exercise the authority over the same. But until such authority is exercised the jurisdiction and power of the state to authorize the erection or construction of bridges over the same is clearly established. But it is urged by counsel for complainants that such authority of the state is confined, as reported by the special master, to cases in which the navigable stream or water is located wholly throughout its entire length, within the limits of the state. It is true that in most of the cases above cited the public or navigable waters were wholly within the limits of the state authorizing the erection of bridges or obstructions in or over the same, and that expressions are found in one or more of the opinions which apparently attach some importance to that fact. The decisions did not, however, proceed or rest upon that ground, but upon the principle that such portions of navigable waters as lay or were embraced within the limits of territorial jurisdiction of the state were subject to state authority, in respect to bridges over the same, until congress exercised its superior

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Syllabus.

and paramount authority of regulation and control. Navigable waters entirely within the limits of a state stand upon the same footing, and are subject to the same controlling authority of congress, as those extending through or reaching beyond the state. The right of the state, in absence of congressional regulation to the contrary, to authorize the erection of bridges over such portion of navigable waters as may be embraced within its limits, does not depend upon the length of such waters, nor is the state's authority restricted or affected by the fact that some portion of the stream may extend beyond its territorial jurisdiction."

It follows from these views that the court erred in giving the instructions above quoted to the plaintiff, and in refusing the instruction above set out to the defendant.

Reversed and remanded.

BUFORD J. BARRIER, JR., *v.* ISHAM M. KELLY ET AL.

1. EQUITY. *Election. Foundation of doctrine.*

The doctrine of equitable election is based on the principle that he who seeks equity must do equity.

2. SAME. *Estoppel. Facts constituting.*

Where a mother, supposing in good faith that she owned an undivided one-half interest in lands, which in fact belonged to her elder son, conveyed the same to a trustee for her younger son when he became of age, and at the same time and as a part of the same transaction the mother conveyed other property to the same trustee for the elder son when he became of age, and the elder son upon reaching majority claimed and received of the trustee all the property conveyed in the deed made for his benefit and enjoyed the same, without objection, for four years thereafter, he is estopped from assailing the title of the younger son to the half interest in the lands.

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Statement of the case.

3. SAME.

In such case had the property conveyed to the use of the elder son exceeded the value of his lands conveyed by the mother to the use of the younger son the elder son might by timely proceedings have canceled the younger son's title and regained his lands upon surrender of so much only of the property conveyed to his use as equaled the value of his lands.

4. SAME. *Pleadings. Construed strongest against pleader.*

In such case, since pleadings are construed most strongly against the pleader, a bill by the elder son to cancel the deed, made by the mother to the use of the younger son, which does not show the value of the property received by the complainant under the deed made to his use, is demurrable.

FROM the chancery court of Yazoo county.

HON. HENRY C. CONN, Chancellor.

Barrier, appellant, was complainant and Kelly and others, appellees, were defendants in the court below. From a decree in defendants' favor the complainant appealed to the supreme court. [See *Barrier* v. *Kelly,* 81 Miss., 266, where a previous appeal in this case was dismissed.]

The facts are fully stated in the opinion of the court, however the deeds involved were as follows:

Exhibit C.

"This indenture made and entered into this 4th day of June, 1890, between Mary Ann Ray, of Madison county, Mississippi, of the first part, and I. M. Kelly, of Yazoo county, Mississippi, of the second part, witnesseth: That the party of the first part in consideration of the love and affection which she bears to her beloved son, Jackson Harvell Ray, now a minor, and for other and divers good and lawful considerations thereunto moving the said party of the first part, not herein expressed, she hereby gives, grants, bargains, sells and conveys to the party of the second part the following real estate, to wit: An undivided

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Statement of the case.

half interest in the east half of the southwest quarter, section seven; the east half and southwest quarter, and east half of northwest quarter, section eighteen, T. 10, R. 2 west, situated in Yazoo county, Mississippi. Also the following tract or parcel of land known and described as follows: North half of section three, township 8, range 3 west; east half of lot 7, section 18, township 8, range 3 east, situated in Madison county, Mississippi. Also the following personal property: A one-half undivided interest in all the cattle and household effects (except one bedroom set and clock, conveyed in deed of this date to the party of the second part for B. J. Barrier), and one horse and buggy being now owned by the party of the first part, and on the place on which she now lives in Madison county, Mississippi, now on my home in Madison county, Mississippi. To have and to hold the same until the said I. M. Kelly and his successors in the trust as hereafter set forth in succession, and subject to the limitations, terms, conditions, uses, and purposes hereinafter specified. But this conveyance is in trust and on the following terms and conditions, and for the following uses and purposes, and subject to the conditions, limitations, powers, and provisions following: Said party of the second part is to take charge of, control, manage, and direct the property herein conveyed to him as he may see proper, in the interest of said minor, until he shall bcome of age, when the said property herein conveyed, and still remaining in the hands of said trustee, shall be delivered to him; and said trustee is hereby directed to make a deed, in fee simple, to said lands, to said Jackson Harvell Ray, who shall thereafter hold the same absolutely. The said trustee is hereby authorized to make any improvements on said property he may see proper, rent out and control the same, and to invest any surplus money he may have, belonging to said minor, in property, which shall in all things follow the trust. Said trustee may resign his trust and appoint a successor in writing, duly acknowledgd and

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Statement of the case.

recorded, or by last will and testament, and, should he die or resign without appointing a successor, the chancellor of the district may, on the application of said minor, or any one in his behalf, appoint a successor, but said minor may have the right to designate such successor, subject to the aproval of the said trustee, and such successor shall have all the rights herein conferred on said Kelly, and be subject to all the requirements and conditions of this instrument. Said trustee shall render to the court which has jurisdiction of the matters of guardianship, an annual account, showing the condition of his trusteeship, but will not be required to show receipt for expenditures, but his account book shall be sufficient evidence of all receipts and expenditures. Said trustee may lease said land in Madison county to the father of said minor on such terms as he might see proper, and make lower prices to him on account of his relationship, if he sees proper to do so. Should said minor die during his minority without a wife living, or issue of the body, or descendants of the same, the property herein conveyed shall go to his half-brother, B. J. Barrier, or his children, or descendants of the same, should he have any. Said trustee is hereby directed to make the necessary conveyances at the proper time to vest the title according to the terms of this instrument. Said trustee is to use sufficient of the proceeds of the said personal property, which he may sell at public or private sale, on such terms as he may think best, and of the rents and profits of said land, in suitably maintaining, educating, and taking care of said minor; and if there should not be a sufficient sum of money realized by said trustee out of the cash, notes, choses in action, delivered to him in accordance with an instrument of even date herewith, executed by me for the benefit of my son, B. J. Barrier, to pay what said trustee is required to pay by said instrument, he may pay such deficit out of the proceeds of said personal property, or rents and profits of said land. It is intended that said trustee shall pay all taxes and other neces-

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Statement of the case.

sary expenditures on said land, and to have such reasonable compensation for his services as the court to which he accounts may allow him. He shall also be allowed such reasonable attorney's fees and other expenses as he may have to incur in and about his trusteeship.

"Witness my signature this the day and year first above mentioned.

"(Signed) MARY ANN RAY."

Exhibit D.

"This indenture made and entered into this the 4th day of June, 1890, between Mary Ann Ray, party of the first part, of Madison county, Mississippi, and I. M. Kelly, party of the second part, of Yazoo county, Mississippi, witnesseth: That the party of the first part for and in consideration of the love and affection which she bears her beloved son, B. J. Barrier, now a minor, and for other divers good and lawful considerations thereunto moving the said party of the first part, not herein expressed, she hereby gives, grants, assigns, and delivers to said party of the second part all of the cash money, notes, choses in action or other evidence of indebtedness now belonging to her; also the following personal property: A one-half undivided interest in all the cattle on the home place in Madison county, Mississippi; also the only bedroom set being on the said place, and an undivided half interest in the bedding and household effects of every kind; also one clock; all being on said place in said county, and property being claimed by party of the first part, and said place referred to being the one on which the party of the first part now resides; and, for consideration aforesaid, the party of the first part, gives, grants, bargains, sells, and conveys to the party of the second part whatever interests she may have in the lands of her former husband, B. J. Barrier, Sr., situated in Yazoo, Madison, and Neshoba

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Statement of the case.

counties, in the state of Mississippi, owned by B. J. Barrier, Sr., at his death. To have and to hold the same unto the said party of the second part and his successors in the trust as hereinafter set forth in succession, and subject to the terms, conditions, uses, and purposes hereinafter specified. But this conveyance is in trust, and on the following terms and conditions, and for the following purposes, and subject to the limitations, powers, and provisions following: The said trustee shall, out of any money, or collections from any notes, choses in action or other evidence of indebtedness, as heretofore mentioned, pay all of the family expenses of or other demands made on him by the party of the first part, or such expenditures as he may think necessary, whether required by the party of the first part, during her life; hereby giving him full and discretionary power during the life of the party of the first part, except so far as she may direct; she reserving the right to direct any expenditure of such property, while she lives, that she may see proper. At the death of the party of the first part, said party of the second part is hereby directed to pay all debts that she may owe, including burial expenses, without probation and registry, as speedily as he can, out of said money, notes, etc., then erect such monument as he may see proper over the grave of the party of the first part and her deceased children, and pay expenses of removing the remains of the latter to the graveyard at Concord Church, in Yazoo county, Mississippi, where the party of the first part directs the said party of the second part to bury her remains. He is next to pay over the sum of one hundred dollars to Miss Eva Barrier, niece of the party of the first part, in consideration for the kindness she has shown and the services she has rendered to the party of the first part. He shall next pay to her husband, J. H. Ray, the sum of ——— dollars; all of which sum, etc., shall be paid out of said money, notes, etc.; and should there be any balance left, the said trustee is to use the same for the benefit of said B. J. Barrier,

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Statement of the case.

as he may require. The party of the first part hereby conferring on the said trustee full power and discretion. The said trustee may sell or dispose of said other personal property as he may think best, either by private or public sale, and on such terms as he may see proper, or retain such portion thereof for the use of the said minor as in his judgment the interest of the said minor may require. Said trustee is also authorized to use any of the said funds for the education, support, and maintenance of said minor, or may lend out or invest any surplus money he may have for the benefit of said minor. And he shall report to the proper court, in his guardianship of said minor, should he act as such, under the last will and testament of said party of the first part, appointing him, or he may report as trustee and separate from any matters of guardianship, his acts and doings hereunder, but his books of account shall be deemed sufficient evidence of his receipts and disbursements in his accounting hereunder, and he shall be allowed a reasonable compensation for his services in this trust and all reasonable attorney's fees and other necessary expenses which he may incur. When said minor arrives at the age of twenty-one, then said trustee shall deliver to him whatever of the estate herein conveyed to him which he has on hand undisposed of, or convey to him any real estate he may have purchased for him, if not already conveyed to him, or the interest in the lands aforesaid of his father. The party of the first part has not conveyed to said trustee for the benefit of said minor any real estate except whatever interest she may have in his father's lands, because said minor has inherited from his father and his deceased brothers sufficient real estate to make him own about an equal amount in value to that owned by party of the first part, and this day conveyed by her to the said party of the second part, as trustee for her son, J. Harvell Ray. Said trustee may, in writing, duly signed and executed and recorded, resign his trusteeship hereunder, and appoint a successor, or may appoint one

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Brief for appellant.

by his last will and testament; and such successor shall have all the rights, powers, and privileges herein given the party of the second part. Witness my signature this day and year first above mentioned, after the interlineation on the third page, 'or the interest in the lands aforesaid of his father,' and 'except whatever interest she may have in his father's lands.'

"(Signed) MARY ANN RAY."

C. H. Williams and *W. W. Lockard,* for appellant.

Appellant was not put to an election for two obvious reasons. First, because there were two separate and complete conveyances, *inter vivos,* between different parties, and each relating to a different subject-matter. Second, if the two conveyances are construed as one instrument, even then the appellant is not put to his election on the face of the pleadings.

"Election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument." This is a simple definition of the doctrine of election. Now the foundation of the doctrine is: "One cannot accept and reject under the same instrument." 11 Am. & Eng. Enc. Law (2d ed.), 59.

Appellant is not attempting to accept and reject under one instrument.

He is not attempting to "approbate and reprobate," as it is termed in Scotch Law. He is taking under his mother's deed to himself, and rejecting nothing under the same. By his bill in the suit at bar, he is asking that he be given what is his own, and which came into his possession, not through his mother, but from another source, and which his mother attempted to convey, in fee simple to Ray, by a deed, complete within itself, and not by the deed made by her to appellant.

Appellees contend that these two deeds from Mrs. Ray, marked Exhibits C and D, should be construed as one, and that

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then appellant would be put to his election, since the grantor conveyed to Ray by Exhibit C some land belonging to appellant and conveyed to appellant by Exhibit D certain money, notes, etc. This brings up the question whether these two deeds, each complete within itself, and between different parties and each relating to a different subject-matter, should be construed as one instrument, to such an extent as to place the appellant in the attitude of accepting and rejecting under that one instrument, and hence put to his election.

It is manifest that here are two deeds, *inter vivos,* drawn, signed and acknowledged separately, not purporting to be the disposition of all the property of the grantor, but made for a consideration between different parties, and each relating to a different subject-matter.

Even in order that two deeds may be construed together "they must be between the same parties and must relate to the same subject-matter." 17 Am. & Eng. Enc. Law (2d ed.), 10.

We contend that, in order that the two may be construed as one, and one of the grantees placed in the attitude of accepting and rejecting under one instrument, and hence bound to elect, it requires even more than the above two requisites for construing them together. But these two deeds sought to be construed as one do not even possess the two requisites of being between the same parties and relating to the same subject-matter. It will be noticed that the authority quoted above uses the word "must" in both requisites given. There is a difference between construing two instruments as one and construing them together. They might be construed together for purposes of interpretation, but more is required to actually construe them as one and put one of the grantees to his election, on the doctrine that he cannot accept and reject under one instrument. It seems that to justify two deeds being construed as one, there should be something in the deeds themselves showing that the grantor intended that the two be taken as one, and especially

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Brief for appellees.

does this seem to be a correct view when the grantor in both deeds is the same person. *Vraig* v. *Wells,* 11 N. Y., 315; *Cornell* v. *Todd* (Denio), 2 N. Y., 130; *Mann* v. *Witbeck,* 17 (Barbour), N. Y., 388; and *Rexford* v. *Marquis,* 7 (Lans.), N. Y., 249.

There is nothing on the face of the pleadings to show that appellant ever got a cent from the notes, money, etc., which appellees claim were given appellant in consideration of Mrs. Ray deeding away appellant's land.

Barnett & Perrin, for appellees.

The bill in this case sets out with great particularity all the circumstances surrounding the transaction, and the conclusion from reading the bill is inevitable that in the mind of the pleader, the instruments referred to as "Exhibits C and D" are part and parcel of the same transaction.

There are two principles of equity which prevent the complainant from maintaining this suit. They are: He who seeks equity must do equity. He who comes into a court of equity must do so with clean hands.

Under the first principle arises the doctrine of equitable election which is expressed by Judge Story as follows, viz.: "The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both." This statement of the doctrine is approved in the case of *Nutt* v. *Nutt,* Freeman's Chan. Rep., 128.

Leaving out now the question as to whether the deed to the complainant and that to his half-brother, Ray, are to be construed as one and the same instrument, we submit that from the deed to the complainant himself it indubitably appears that it was the intention of the complainant's mother, the grantor, that he should not have the gifts bestowed by said deed, and at the same time deprive his half-brother of any portion that was

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Opinion of the court.

given to him by the deed executed for his benefit. Many authorities hold that the doctrine of equitable election is simply an application of the doctrine of equitable estoppel.

On the second ground, viz.: "That he who comes into equity must do so with clean hands," the demurrer was also rightfully sustained. Appellant had made a settlement with the trustee under his mother's deed some three years or more before the filing of the bill. Whatever benefits had accrued to him under that settlement, and in accordance with the terms of his mother's deed, he had accepted without complaint; he had carried out his mother's intentions and now desires to have them set aside so far as they affect his brother, J. H. Ray, Jr., without divesting himself of the benefits obtained thereby. This conduct is so inequitable, that we do not believe a court of equity will sanction it.

WHITFIELD, C. J., delivered the opinion of the court.

At the time of the death of Mrs. Ray, B. J. Barrier, Jr., became the legal owner of the entire Taylor tract of land. His mother had first been married to Mr. Barrier. The only issue surviving from this marriage was B. J. Barrier, Jr., the appellant. After the death of Mr. Barrier, the widow intermarried with Mr. Ray, and by him had one son, the appellee. The appellant and appellee were, therefore, half-brothers. Mr. Barrier and Mr. Ray had bought, each, an undivided half interest in the Taylor tract of land. These transactions occurred before the code of 1880 abolished dower. Mrs. Barrier, upon her husband's death, was entitled to dower in that half of the Taylor land bought by her husband Barrier, which dower was never assigned. Upon her death, the dower interest expiring, B. J. Barrier, Jr., became sole owner of that undivided half interest. After the marriage of the widow Barrier to Mr. Ray, and before the birth of their son, the appellee, Mr. Ray conveyed his undivided half interest to

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Opinion of the court.

Mrs. Ray, then his wife, for her life, remainder to two Barrier sons then living, of whom B. J. Barrier, Jr., was one. The other Barrier son died, and B. J. Barrier, Jr., inherited this interest. Of course, upon the death of Mrs. Ray, her life estate in this land expired, and appellant became sole owner of that half interest, also, in the Taylor land. So that, as stated, on the death of Mrs. Ray the appellant became the sole owner of the legal title of the entire Taylor land. On the 4th of June, 1890, Mrs. Ray made two deeds, by one of which she conveyed to I. M. Kelly, as trustee for J. H. Ray, Jr., an undivided half interest in certain chattels and household effects, and a buggy and a horse, and attempted to convey an undivided half interest in the said Taylor land to I. M. Kelly, trustee, to be by him conveyed to J. H. Ray, Jr., upon his arrival at majority. By the other deed she conveyed to I. M. Kelly, trustee, for the benefit of B. J. Barrier, Jr., "all of the cash money, notes, choses in action and other evidences of indebtedness" belonging to her at the date of the deed; also one undivided half interest in the cattle on the home place; also the only bedroom set of furniture, and also an undivided half interest in the bedding and the household effects of every kind; also one clock, and whatever interest she might have in the lands of her husband, B. J. Barrier, Sr., situated in Yazoo, Madison and Neshoba counties, in this state, and owned by her husband, B. J. Barrier, Sr., at his death. She, however, reserved the right during her life to make any expenditure out of the notes, cash, etc., she might see proper; and she further charged the cash, notes, etc., with the family expenses, for debts, burial expenses, the cost of erecting a monument over herself, and of removing the remains of her deceased children to the graveyard at Concord Church, and with the payment of a legacy of $100 to Miss Eva Barrier, her neice; and the balance, if any, was to be used by the said trustee for the benefit of B. J. Barrier, Jr., as he might require. In this last deed the

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grantor says: "The party of the first part (the mother) has not conveyed to said trustee for the benefit of said B. J. Barrier, Jr., any real estate, except whatever interest she might have in his father's lands, because said minor has inherited from his father and the deceased brother sufficient real estate to make him own about an equal amount, in value, to that owned by the party of the first part, and this day conveyed by her to said party of the second part (Kelly) as trustee for her son J. Harvell Ray." These deeds were made on the same day, mutually referred to each other, not for description of the property, merely, and are plainly parts of one transaction, and to be construed as one instrument. The mother, having executed these deeds on the 4th of June, 1890, died June 10, 1890.

We think it perfectly clear that Mrs. Ray believed herself to be owner of the undivided half interest in the Taylor land which she attempted to convey to her son, J. H. Ray, Jr., and in which her husband had conveyed to her a life interest only; and, second, that she believed her Barrier son, the appellant, owned the other undivided interest in that same land, which came through his father, subject to her dower interest. She also thought she had some interest in certain lands in Madison and Neshoba counties, which she conveyed to her son B. J. Barrier, Jr.

In July, 1890, Kelly qualified as guardian to B. J. Barrier, Jr., in Madison county. On the 16th of November, 1897, B. J. Barrier, Jr., became 21 years of age; and in March, 1898, Kelly made his final report as trustee and guardian of Barrier, reporting a settlement between him as trustee and guardian, according to the terms of the deed of Mrs. Ray to Kelly for Barrier's benefit, and was discharged by the court. Some four years thereafter, to wit: on December 30, 1901, appellant filed this bill against his late guardian, Kelly, and his half-brother, the appellee, claiming that he was owner in fee simple of the entire Taylor tract of land, one undivided half interest in which

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his mother had attempted, as shown, to convey to his half-brother, J. H. Ray, Jr. He prayed that this deed should be canceled as a cloud upon his title; and, second, that the court should decree him possession of, and ownership in fee simple of, the entire Taylor tract of land; third, that Kelly, trustee, should be required to account and pay over to him the other half of the rents and profits from said land, which he had collected since and including the year 1890, together with the interest at legal rate thereon; and, fourth, that in case Kelly had paid these rents to J. H. Ray, Jr., he, the said Ray, should be required to account and pay over same to him. The appellee, at the May term, 1902, demurred to this bill upon the ground that it showed no cause of action, and that the appellant did not offer to do equity. This demurrer was sustained by the court, and sixty days allowed complainant in which to amend his bill, or file an amended bill in the case. The complainant declined to amend his bill in the sixty days allowed him, whereupon the court below dismissed the bill, and from that order this appeal is prosecuted.

It will be observed that the bill was dismissed under the principle of equitable election; the court holding that the appellant had made his election in accordance with the instrument, and not against it, and that he could not now repudiate that election. It will be specially noted that in this case it is clear, first, that the mother believed herself to be the owner of the land she attempted to convey to the appellee, and hence could not have intended to convey that land as being the appellant's property, and, second, that nevertheless she did in fact attempt to convey what was not hers, but plaintiff's property. It is clear, therefore, on the face of the instrument, that she did convey, or attempt to convey, an undivided half interest which was not her property, but wholly the property of appellant, and by the same instrument did convey to him, first, the surplus left from the profits of cash, notes, etc.; second, certain specific

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household effects; third, an undivided half interest in the cattle on the place; and, fourth, whatever interest she had in certain lands in the three counties named.

One of the fundamental differences between the doctrine of equitable election, as we administer it, and as it was administered under the Roman civil law, from which it was borrowed, is that with us the doctrine of equitable election applies, whether the donor was or was not aware that he was dealing with property not his own. 1 Pom. Eq. Jur., sec. 463; 1 White & Tudor's Leading Cases in Eq., p. 546; note to *Streatfield* v. *Streatfield;* and the Am. & Eng. Enc. Law (2d ed.), vol. 2, p. 68 (2). Another difference between the two systems is that under the civil law the doctrine of equitable election was confined to wills. See Mr. Swanston's notes to *Dillon* v. *Parker,* 1 Swanston, 359, and note, above referred to, in 1 White & Tudor's Leading Cases in Eq., vol. 1, pt. 1, pp. 513-541. With us the doctrine applies to deeds, wills, and all other instruments whatsoever. One of the differences between the application of the principle to a will and to a deed is that "in the case of deeds, such as settlements, a person may be compelled to elect, although there is not a clear intention on the part of the settler to dispose of property which is not his own; and this on the ground that a person cannot accept and reject the same instrument." See Am. & Eng. Enc. Law (2d ed.), vol. 2, p. 69 (5), and note 2. Lord Redesdale said of this in *Birmingham* v. *Kirwan,* 2 Schoales & L. 444, cited in said note, that this difference arose "because deeds are generally matter of contract, and the contract is not to be interpreted otherwise than as the consideration, which is expressed, requires." We note this distinction, though it is immaterial in this case, since it is perfectly manifest here that Mrs. Ray did intend to convey the property she attempted to convey to Kelly for her son, Ray. There is no doubt about her clear intention so to convey, and no doubt that clear intention appears on the face of the instru-

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ment; and just as little doubt that she meant to convey it as her own, the fact being that it was complainant's property. The doctrine of equitable election is, in our judgment, not founded on intention, as held by so many cases, but is, as stated by Mr. Pomeroy, "a positive rule of law, covering the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, although in the vast majority of cases it undoubtedly does carry into effect the donor's real purpose and desire." The doctrine rests, as we think, upon the equitable principle that he who seeks equity must do equity. We approve and adopt the statement of the doctrine by the United States Supreme Court in *Peters* v. *Bain,* 133 U. S., 395; 10 Sup. Ct., 354; 33 L. Ed., 696, as follows: "The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that, where two inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other, and so, in other words, that one cannot take a benefit under an instrument, and then repudiate it." In *Cooper* v. *Cooper,* L. R. 7, H. L. 67, Lord Chancellor Cairns, in explaining that the doctrine is applied without reference to whether the donor knew that the property of which he attempted to dispose belonged to another, said: "The rule . . . . does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity, founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." Mr. Pomeroy makes the matter exceedingly clear in section 464: "A disposition calling for an application of the doctrine of election may be made under the two following different states of circumstances: Either the donor may know

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that the property which he assumes to deal with is not his own, but belongs to another, and notwithstanding such knowledge he may assume to give it away, or he may give it away, not knowing that it belongs to another, but erroneously and in good faith supposing that it is his own. In the first of these two cases the presumption of an intention on the part of the donor to annex a condition to the gift calling for an election by the beneficiary plainly agrees with the actual fact. At all events, it violates no probabilities. When a testator devises an estate belonging to A to some third person, and at the same time bestows a portion of his own property upon A, he undoubtedly must rely upon the benefits thus conferred upon A, as an inducement to a ratification by A of the whole disposition. To give A the property which the testator was able to dispose of, and at the same time to allow him to claim his own estate, which had been devised to the third person, by his own paramount title, would be to frustrate the evident intention of the testator. In the second case, where the testator or other donor erroneously supposes that the property which he undertakes to give away is in fact his own, the doctrine of election applies with the same force and to the same extent as in the former. Here it is, in the nature of things, simply impossible that the donor could actually have had the intention which the theory imputes to him, since he really believes himself to have a disposing power over the property, or to be dealing with property which is his own."

This case falls squarely within the second category stated by Mr. Pomeroy, and it is simply impossible that the grantor, Mrs. Ray, could have had the intention imputed to her by the theory, since she believed herself to be disposing of her own property. We prefer, therefore, the broader view of the supreme court of the United States, of Mr. Pomeroy, and of Lord Chancellor Cairns, that the rational basis of the doctrine is not to be found in the supposed intention of the donor, but in the equitable

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principle that he who seeks equity must do equity. We think this doctrine applies in full force to this case. Appellant has made his election. He has been receiving since 1890 whatever surplus has been yielded from the cash, notes, etc. He has retained the specific personal gifts, and for four years after his arrival at age, and after a full settlement with his guardian has been made, has made no objection; all the while knowing, as is clear from the pleadings, that his half-brother was in reception of the rents and profits of the lands attempted to be conveyed to him by his mother. Equity will not permit him now to rip up the whole transaction, alter the entire situation, and repudiate his election once definitely made. It is true that the equitable doctrine of election is administered upon the principle of compensation, and not of forfeiture, though, as said by Gibson, C. J., in *Lewis* v. *Lewis,* 1 Harris, 79, 53 Am. Dec., 443, there may be some few cases in which the principle of forfeiture alone can be applied. In Am. & Eng. Enc. Law (2d ed.), vol. 2, p. 115 (3), the rule is thus expressed: "According to the great weight of authority, as now conclusively established, the refractory donee does not, in such event, forfeit the benefit or estate conferred upon him, but is bound only to make compensation out of it to the disappointed donee to the extent of the value of the property of such refractory donee which the donor has attempted to bestow upon such disappointed donee. In such case a court of equity treats the refractory donee as a trustee, and will sequester the benefit intended for him, in order to secure compensation to the disappointed donee. But the excess does not go to the personal representative of the testator, as if undisposed of, but is to be given to the refractory donee; the purpose being satisfied, for which alone the court controlled the legal right. See, also, 1 Pom. Eq. Jur., sec. 468, and note 1 on page 636, and 1 White & Tudor's Leading Cases in Eq., note, *supra,* vol. 1, pt. 1, p. 543. And it follows from this principle of compensation that, since appellant in this case

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had his election to claim against the instrument and retain his own property, he might, in case the surplus arising from the cash, notes, etc., and proceeds of other personal property given him, had exceeded in value his property conveyed to his brother, have retained, in addition to his own property, the difference between the value of that property and such surplus, and it is earnestly urged that the bill does not show anything but the mere settlement between him and his guardian, or that he had received a dollar therefrom, and that the bill further does not show that there was any surplus left from said cash, notes, etc. But the perfect reply to this is that all this lay peculiarly within the knowledge of complainant, and, under the rule that the pleadings must be taken most strongly against the pleader, it must be presumed that if the fact had been that there was no such surplus from such cash, notes, etc., he would certainly have averred it. The bill avers the rents of the entire Taylor tract of land to be only $300, and it may be that appellant has derived from cash, notes, etc., and other personal property, more, in value, than the undivided half interest in said land attempted to be conveyed by his mother to appellee was worth. At all events, it was the duty of complainant to fully and particularly disclose the truth as to this—most especially so when he comes into a court of conscience, pressing his legal rights to their utmost limit, without offering to return anything he may have received. It is true, he was an infant up to his arrival at age in November, 1897. But he waited, under the peculiar circumstances we have set out, four years thereafter, to file this bill. We are clearly of the opinion that the learned court below was entirely right in applying to him the principle of equitable election.

Not only did the court below give him sixty days in which to amend this bill, but said time was given, if he chose so to use it, in which to file an amended bill; and the inference from his failure to avail himself of leave to do either is irresistible

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Statement of the case.

that he had stated his case as strongly as it was possible to state it, and that, had he made the full disclosure equity required at his hands in the situation, it would appear that he had elected to keep what his mother gave him, because it was worth more than the land belonging to him, which she had conveyed to Kelly for his brother's benefit.

Affirmed.

SAMUEL DABNEY v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Rape. Evidence. Larceny. Other Offenses.*

On the trial of an indictment for rape it is error to admit evidence of the commission of larceny by the accused, such evidence not being necessary to identify the defendant and there being no connection between the offenses.

2. SAME. *Evidence of other offenses. Benefit of doubt.*

The general rule is that evidence of other crimes than the one for which the accused is being tried is inadmissible, and if it be doubtful whether such evidence falls within any of the exceptions to the rule it should be excluded.

3. SAME.

Discussion of exceptions to the general rule.

FROM the circuit court of Adams county.

HON. JEFF TRULY, Judge.

Dabney, appellant, was indicted, tried and convicted of rape, and appealed to the supreme court.

On the trial a witness was permitted to testify, over defendant's objection, that he, the witness, lived in an adjoining room to the prosecutrix and that his trunk was broken open and a suit of clothes stolen therefrom by defendant about the time the woman claimed to have been raped.

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Opinion of the court.

R. L. Jones and *A. Jones,* for appellant.

The court erred in admitting evidence for the state as to defendant's stealing clothes from the house of prosecutrix, and thereby biasing the jury against him and causing it to convict him on general principles because he seemed guilty of larceny, which crime probably furnished the motive for his being prosecuted.

J. N. Flowers, assistant attorney general, for appellee.

The testimony about the clothes being stolen was competent, since it helped to establish the identity of the accused.

WHITFIELD, C. J., delivered the opinion of the court.

It was error to admit the testimony as to the appellant's breaking into the trunk and stealing the clothes therefrom. There are cases in which it is competent to prove the commission of other crimes, and the principle within which this proof is allowed is very clearly stated in Rice's Evidence, vol. 3, c. 25. Such proof is allowed where the different crimes are parts of a system of crimes. An illustration of this is the case of *Regina* v. *Geering,* 18 L. J. M. C., 215. That was the case of a woman indicted for poisoning her husband in September, 1848, and the question was whether the poison was accidentally or intentionally administered, and it was held competent to show that three sons had been poisoned by the administration of the same poison in December, 1848, March, 1849, and April, 1849, and that defendant had prepared the meals containing the poison for all four of the poisoned persons. Where one crime is shown to be intimately connected with another, so as to furnish the motive for the commission of the crime charged, it is permitted to prove such other crime. We select two of the best statements we have found of the exceptions to the rule; one contained in the opinion of Agnew, J., in *Shaffner* v. *The Commonwealth,* 72 Pa., 60, 13 Am. Rep., 649, set out on page 209 of volume 3

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of Rice on Evidence; and the other contained in the opinion of Judge Dickson in *State* v. *Raymond,* 53 N. J. Law, 260, 21 Atl., 328, set out at page 212 in Rice's work, *supra.* The former is as follows: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but is detrimental to justice, to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence it is obvious that it should not be received unless the mind plainly perceives that the commission of the one tends by a visible connection to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." *Shaffner* v. *Commonwealth,* 72 Pa., 60, 13 Am. Rep., 649 (Agnew, J.). Judge Dickson's statement in the other case referred to, is as follows: "One arises where the circumstances of the crime indicate that they were both committed by the same person; as, if two buildings should be fired by similar novel contrivances (*Com.* v. *Choate,* 105 Mass., 451), or, perhaps, the notorious Whitechapel murders. Another, when the defendant's perpetration of an extraneous crime shows that he had the opportunity of committing the crime in issue. *Rev.* v. *Cobden,* 3 Fost & F., 833. Another, when the several crimes may have sprung from a single motive

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aiming at the accomplishment of the same end. *People* v. *Wood,* 3 Parker, Cr. R., 681. Another exception exists, when the commission of a different offense discloses a motive for the commission of the offense charged; *e. g.,* the defendant's adultery with a wife may be relevant on his trial for the murder of her husband. *Com.* v. *Ferrigan,* 44 Pa., 386. Another, when one crime may have been perpetrated for, or as a means of committing, concealing, or escaping from another. *Rex* v. *Clewes,* 4 Car. & P., 221. Exception is made also when the acts charged to be criminal may reasonably be innocent, and are criminal only when performed with a certain intent, or with the knowledge of a certain fact. In such case other acts of the defendant, though criminal, may be deduced to prove that he had such specific intent or knowledge. In this category stand the decisions with regard to the utterance of counterfeits, the making of false pretenses, the reception of stolen goods, the publication of libels, and probably occurrences claimed by the defendant to be accidental. Whart. Crim. Ev., sec. 50, and notes; *Reg.* v. *Francis,* L. R., 2 C. C., 128."

The two offenses here — rape and larceny — are entirely separate and distinct offenses, having no logical connection or dependence one upon the other. The proof of the larceny furnished no motive for the commission of the other offense, and, if the appellant had been indicted for larceny, it would not have been competent to allow proof of the rape. They are separate and distinct offenses in the eye of the law, and were so, as a matter of fact, on this occasion. It will be noted that proof of the other crime should not be admitted for the purpose simply of identifying the defendant, unless it be absolutely necessary for his identification. The learned circuit judge, when the objection was first made, sustained it, but later on overruled it, and permitted the testimony to go to the jury. We presume that he must have done this for the purpose of identifying the defendant, but it was wholly unnecessary for this purpose, since

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Brief for appellant.

the other proof in the case abundantly identified the defendant. The testimony of the prosecutrix and of Rose Ann Warner as to the clothes he had on fully identified him.

Reversed and remanded.

MARY THOMAS v. CHRISTINA ROMANO.

1. ESTOPPEL. *Conduct. Divestiture of title. Absence of fraud.*

In the absence of fraud, misrepresentation, culpable silence, or their equivalent, a party cannot by estoppel be divested of title to real estate.

2. SAME. *Falsehood. Knowledge of facts.*

An equitable estoppel can be predicated of conduct only where the party sought to be estopped acts with full knowledge of the facts, unless he asserts to be true that which he does not know to be true, and his adversary relies upon the statement and thereby suffers injury.

3. TAX TITLE. *Cancellation. Liability of complainant.*

Where a tax title is vacated at the suit of a party, the complainant is liable for the taxes paid by the grantee in the tax deed, with damages, interest and cost.

FROM the chancery court of Warren county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Mrs. Romano, appellee, was complainant, and Mrs. Thomas, appellant, was defendant in the court below. From a decree in complainant's favor defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Dabney & McCabe, for appellant.

It may be stated as a general rule, that the conduct relied on to sustain an estoppel must have been made with full knowledge of the facts by the party to be estopped, unless his negligence

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Brief for appellee.

was the result of gross ignorance or otherwise involves gross culpability. 11 Am. & Eng. Enc. Law (2d ed.), 433.

It is perfectly certain that Mrs. Thomas did not know that she was the owner of the title to an undivided one-third interest in this land when Mrs. Romano bought from Hughes. On the contrary, it is perfectly certain that she believed that she had lost her title to the undivided one-third interest in the property, and this information she acquired from two first-class lawyers through P. L. Hennessey.

It may be stated as a general rule, that it is essential to the application of the principles of equitable estoppel, that the party claiming to have been influenced by the conduct or default of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient or available means of acquiring such knowledge, and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. 11 Am. & Eng. Enc. Law (2d ed.), 434.

There is no evidence that Mrs. Romano was destitute of knowledge as to the condition of the title which she obtained from Hughes, nor is there any evidence that she was destitute of any convenient and available means of acquiring such knowledge. There is abundant evidence that the facts were as well known to her as they were to Mrs. Thomas, and that both had the same means of ascertaining the truth.

J. M. Shelton and Shelton & Brunini, for appellee.

It is true Hennessey was the agent of Mrs. Thomas to sell the property and settle with Hughes, and any statement made to Mrs. Romano by Hennessey while negotiating the sale was a part of the *res gestae,* and is to be treated in law as if made by Mrs. Thomas herself.

The authorities to sustain this proposition are numerous, but we content ourselves with two. On page 1143, par. 3, vol. 1

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Brief for appellee.

(2d ed.), American & English Encyclopedia of Law, it is said: "The statements, representation, and admission of an agent, made in the execution and within the scope of an authority delegated to him and in reference to business depending at the very time, will be binding upon the principal as a part of the *res gestae*.

In *Haven* v. *Brown*, 22 Am. Dec., 211, the supreme court of Maine said: "The declarations of an agent, so far as they constitute a part of the *res gestae*, or in other words, such as are made by him at the time he is engaged in making a contract on the part of his principal, and having reference to the subject-matter of such contract, may be given in evidence to affect his principal. They are admitted as the representations of the principal himself, whom the agent represents while engaged in the particular transaction.

Representations made by an agent, at the time he is contracting for his principal, constitute a part of the contract, as much as if they had been made by the principal; and a fact stated by an agent in relation to a transaction, in which he is then engaged, and while it is in progress, forms a part of that transaction. But what he says at another and subsequent period cannot be evidence against the principal. The agent's declarations are received, not as an admission, but as part of the *res gestae*."

Hennessey went to see Hughes' attorney, from whom he learned what Hughes would take, and made a deed to the land. He also learned that the children's interest could not be sold except by a proceeding in the chancery court; and arranged with Mr. Brunini to prepare the papers and obtain the decree of the chancery court for the sale of the children's interest; and it was arranged that Mrs. Romano should pay Hughes the money demanded by him, and Hughes was to make a deed directly to Mrs. Romano, and when the sale of the children's interest was made, Mrs. Romano was to bid a certain sum on it.

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Opinion of the court.

The money that was to be paid by Mrs. Romano was to be paid for Mrs. Thomas' interest. It was to get what title Mr. Hughes had at the time.

Two facts clearly appear: First, that Hennessey was Mrs. Thomas' agent, with full power to sell the land and settle the claim of Hughes and get a deed from Hughes; second, that in negotiating the sale, Mrs. Romano was told both by Mrs. Thomas' agent and her attorney that Hughes was to convey the land directly to Mrs. Romano, and that this would vest in Mrs. Romano a good title to the land, free from the claims of Mrs. Thomas; and that, relying on this statement, Mrs. Romano paid out her money to Hughes and took a deed from him.

PRICE, J., delivered the opinion of the court.

Mary Thomas and her two minor children owned and were tenants in common of certain lots of land in the city of Vicksburg, and were nonresidents, living in Delta, Louisiana. In March, 1896, the sheriff and tax collector of Warren county sold the land for the unpaid taxes of 1895, when S. R. Hughes became the purchaser. Hughes had his deed recorded, and on the 27th day of June, 1898, the land not having been redeemed, he filed his bill in the chancery court against Mary Thomas and her two children, Mamie and Nona McNamara, for confirmation of his tax title, and had a decree confirming the same. At the September term of the chancery court, 1899, this matter for the confirmation was reopened and Mrs. Thomas and her two minor children, who had only been served by publication, each filed a demurrer to Hughes' bill. The demurrer was sustained, with a decree following dismissing the bill, and Hughes appealed to this court (29 South., 74), and the case was affirmed, and Hughes' tax title declared void. In the meantime, and prior to the dismissal of Hughes' bill, Mrs. Thomas came over to Vicksburg, and there ascertained that Hughes had been paying taxes on her land for about three years. She was later

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informed, and on the same day, by Hennessey Brothers, real estate agents, that Hughes owned her land. She was at once taken by Mr. Hennessey to the law office of Shelton & Brunini, Hughes' attorneys, who told her that Hughes' tax title had been confirmed, and that her one-third interest in the property was lost. Upon being so advised, she verbally agreed that Hennessey procure a purchaser for the land, in order that she might get the two children's interest, as she was badly in need of it for their support. She was later advised by Mr. Brunini that it would require a bill in the chancery court before the minors' interest could be disposed of. The firm of Shelton & Brunini, on the 2d day of November, 1898, for Mrs. Thomas, as guardian for her two minor children, filed a bill in the chancery court to have the land sold. Mr. Hennessey procured a proposed purchaser in the person of Mrs. Christina Romano, the appellee here. Shelton & Brunini and Hennessey explained to Mrs. Romano the tax title and the chancery proceedings necessary for a sale, and that Mr. Hughes was threatening about this time to take possession of this land under his tax title, which at that time was believed by all parties concerned to be good. Romano entered into an agreement that she would pay for the property, at commissioner's sale, $1,000. It was represented to Mrs. Thomas that it would take $303.21 to satisfy Hughes and procure a conveyance of her interest in the property, and that this should be done at once, and at the confirmation of the commissioner's sale, Mrs. Romano would pay into court for said minors $666.66. Mrs. Thomas could not read or write, and was a very ignorant woman, and seems to have understood very little of the transactions. Mrs. Romano paid Hughes the $303.21, or to his attorneys, Shelton & Brunini, and Hughes conveyed the land to Mrs. Romano. The matter ran along for some time, when there appears to have been some dispute about the rents and possession of the property. At this juncture in the history of the transaction, Mrs. Romano filed her bill in

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the chancery court to estop Mrs. Thomas from asserting her title to the one-third interest in the land, and upon the final hearing the chancellor decreed that a special commissioner convey Mrs. Thomas' interest in the land to Mrs. Romano, and from that decree this appeal is taken.

We have only stated such facts as we think necessary to the understanding of the proposition seriously involved here. The bill in this case was filed and proceeded with upon the ground of estoppel upon the part of Mrs. Thomas to assert title to a one-third interest in the land, and the case was, in its last analysis, fought out on that basis. In the absence of fraud, misrepresentation, culpable silence, or their equivalents — and there is no fraud alleged, no misrepresentation proven, no culpable silence shown — the weight of authority is that one cannot be divested of the legal title to real estate by estoppel. Mrs. Thomas never had any negotiations with Mr. Hughes, and had no settlement of any doubtful claim, because it is admitted that all parties thought Hughes held a good title to Mrs. Thomas' one-third interest. Hughes' tax title was on record, void on its face; but Mrs. Thomas made no representation concerning her title, and in fact knew really nothing about its real condition. Her information was obtained from Hughes' attorneys and Hennessey, the real estate agent. She never saw Mrs. Romano before the sale by Hughes conveying the land to Mrs. Romano. There is no contention that she authorized any one to make any representation, or that any one undertook to make any representations to Mrs. Romano for her. Conduct relied on to sustain equitable estoppel must have been made with full knowledge of the facts by the party to be estopped, unless he asserts as true a fact which he does not know to be true, and his adversary relies upon such statement, to his injury. Silence, in the absence of knowledge of one's rights will not work an estoppel. In vol. 11, Am. & Eng. Enc. Law (2d ed.), p. 434, it is laid down as a general rule "that it is essential to the application of

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equitable estoppel that the party claiming to have been influenced to his injury by the conduct or declaration of another was himself not only destitute of the knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and when the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Estoppel sprung from a determination to prevent fraud resulting in injustice. *Kelly* v. *Wagner,* 61 Miss., 302; *Staton* v. *Bryant,* 55 Miss., 269, and *Murphy* v. *Jackson,* 69 Miss., 403; 13 South., 728. Mrs. Thomas, however, is liable to Mrs. Romano for such amounts only as she was legally liable to Hughes for — that is, the taxes, damages, interest, and costs — and her interest in the land stands charged with the amount, and Mrs. Romano cannot look to Mrs. Thomas for a restoration of the *status quo.*

The decree will be reversed, and the case remanded for an accounting to be taken in keeping with this opinion.

Reversed and remanded.

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Statement of the case.

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WIRT ADAMS, STATE REVENUE AGENT, v. COLONIAL AND UNITED STATES MORTGAGE COMPANY.

TWO CASES.

1. TAXATION. *Loans by nonresidents. Business situs. Mortgages.*

Loans of money by a nonresident of the state who has no business location or agent here, made on applications sent to the lender or his agent out of the state, are not taxable in this state, although negotiations for the loans are made here and they are secured by mortgages on lands here.

2. SAME. *Code* 1892, § 3757.

Code 1892, § 3757, providing for the assessment and taxation of money loaned applies only to resident lenders of money and such nonresident lenders as have a place of business or be temporarily located in this state or whose property has a situs here.

3. SAME.

Legislation suggested by which loans by nonresidents may be taxed.

One case, from the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

The other, from the chancery court of Copiah county.

HON. HENRY C. CONN, Chancellor.

Adams, State Revenue Agent, appellant in both cases, was plaintiff in the Coahoma county suit in the court below, and complainant in the Copiah county suit; the mortgage company, appellee, was defendant in both cases.

The two cases were heard in the supreme court together.

The Coahoma case is an attachment suit brought in the circuit court of that county, by appellant against appellee, to recover

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Statement of the case.

taxes for several past years on notes and mortgages belonging to appellee, as "solvent credits," and it was tried before the judge, a jury having been waived, on the following agreed statement of facts:

"The defendant is a foreign corporation organized under the laws of Great Britain, and has its domicile at Hull, England; the trustee in all of the trust deeds is a resident of Hull, England; defendant has an agency in Memphis, Tenn., but has no office or place of business in Mississippi. J. A. Glover, an attorney at Clarksdale, Miss., has been for years advertising that he was prepared to make loans, and that a considerable proportion of the loans made by defendant to borrowers in Coahoma county, and secured by deeds of trust on lands in that county, were made upon applications in writing which came to defendant's office in Memphis, Tenn., through said Glover, on forms furnished him by defendant, in which the lands offered as security were described; these forms could be obtained by any one who desired to make use of them, and some of said loans now in force in Coahoma county were made to the borrower upon applications which came from other attorneys or the borrowers direct; upon receiving the applications the lands are inspected by an inspector employed by defendant in Memphis for that purpose; if, upon the inspector's report, it is decided to make the loan, the applicant is notified that if, upon investigation, his title is good, the loan will be made; the applicant is requested to furnish an abstract of his title, and, if this is satisfactory, deeds are prepared by defendant in Memphis, Tenn., and forwarded to the applicant for execution, with notice that when they are executed, and the trust deed recorded, and the papers returned to defendant's office in Memphis, the amount of the loan will be paid, and the money is paid by sending the borrower a check or paying a sight draft attached to the papers when returned; when the trust deeds are received by defendant's agent in Memphis

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Statement of the case.

they are at once sent to defendant's home office in Hull, England, where they remain until they mature, when they are returned to the agent of defendant at Memphis, Tenn., for collection. The notes are all signed and dated in Coahoma county, Miss., and are made payable in Memphis, Tenn. The value of the lands upon which security is taken always exceeds the amount of money loaned. When the loan is consummated, defendant pays Glover, or the party from whom the application came, a commission upon the amount loaned."

From a judgment for defendant, plaintiff appealed to the supreme court.

The Copiah case is an appeal from a decree of the chancery court of that county sustaining a demurrer to complainant's bill against the same defendant. The bill alleges that defendant is a nonresident corporation, domiciled at Hull, England, and having an office and place of business in both New York and Memphis, Tenn.; that defendant owns real estate and personal property in Copiah county, Miss., which escaped taxation, to wit: the interest of defendant as mortgagee and *cestui que* trust in certain deeds of trust and mortgages set out in the bill; that defendant was properly and duly assessed; that the evidences of debts secured by said trust deeds and mortgages are in the possession of defendant at its domicile beyond the state, and that they represent money loaned to said several parties by defendant through its agent at Memphis, Tenn. The bill then states the amount of taxes claimed to be due. Defendant demurred, setting up the following grounds: 1. The facts stated in the bill show no liability of defendant for either the state or county taxes. 2. The defendant has no interest in the mortgages or trust deeds which are the subject of taxation. 3. To sustain the assessment would deprive defendant of its property without due process of law, and in violation of article 14 of the amendments of the constitution of the United States. The court sustained the demurrer, and dismissed the bill. Complainant appealed to the supreme court.

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Brief for appellant.

R. N. Miller, for appellant.*

The question presented in the Copiah case is not whether the debts secured by these mortgages belonging to a nonresident are taxable, but the question here presented is whether or not the interest or estate of the mortgagee in the land in this state is taxable. The case of *Wirt Adams, Revenue Agent,* v. *Colonial & U. S. Mortgage Co., Limited,* from Coahoma county, now pending in this court, presents the question of whether the debts are taxable because of the peculiar features of the mortgages, and because they were contracted for appellee by its agent in this state.

The Copiah case presents a wholly different question: (1) Whether this estate of the mortgagee is property, separate and independent of any other interest in the land mortgaged. (2) If so, is its situs in Mississippi with the land, and therefore taxable? By sections 3755 and 3757 of the code of Mississippi of 1892, all property in this state is subject or liable to taxation, except the specific property enumerated as exempt in said section 3744. If I can demonstrate that this estate of the mortgagee is property, and that its situs is with the land in Mississippi, then I take it that I have made out my case.

The fact that the man or corporation who owns lands in Mississippi, or an interest or estate in lands in Mississippi, which is taxable, is a nonresident, makes not one particle of difference, because the situs of the land is in Mississippi, regardless of the domicile of the owner, and the land or the estate in the land must pay the taxes. For the purpose of taxation, therefore, is the estate of the mortgagee property? In the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, this court held that a debt secured by a mortgage in this state followed the domicile of the holder, a nonresident, and was not subject to taxation here, because the evidence of the debt, following the domicile of the holder, was beyond the jurisdiction of our taxing law. I have no quarrel with that decision. It

* The briefs of counsel in this case are published in full by order of the court.

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has no sort of application in this case, because, I repeat, we are not seeking to tax the debt; but we are seeking to tax the mortgagee's estate in the land mortgaged, through the security, the situs of which abides in the land where the mortgage is recorded. It is not a question of situs, because no one would dispute that, if this estate of the mortgagee in the land is property, then its situs must be where the land is. This estate does not, like the debt, follow the residence of the owner.

Returning, now, to the main proposition: Is the estate of the mortgagee in the land property? "Because of the fact that a mortgage is regarded as of a dual character, a conveyance of an estate in land and a security for a debt, bearing one character in a court of law and another in a court of equity, a mortgage at the present day, in the absence of statutes providing otherwise, vests the legal title to the mortgaged property in the mortgagee, at any rate after condition broken." 20 Am. & Eng. Enc. Law, p. 900; Code Miss., 1892, sec. 2449. The mortgagee has at least an equitable estate, if not a legal estate, in the land; and it must be property, because it may be sold under execution. It is liable for debts. *Leigh* v. *Harrison,* 69 Miss., 923; 11 South., 604; 18 L. R. A., 49.

"For most purposes the interest of a mortgagee in the property mortgaged is looked upon as a chattel interest only, and upon his death his interest in the property passes to his representative, and not to his heirs. But the personal representative does not take it in his own right, and simply holds it in the fiduciary capacity, and in trust for the heir, who is in equity, in the absence of creditors, entitled to it. His interest, however, is considered real, in that it enables him to maintain ejectment for the possession of the land mortgaged, notwithstanding that in every other point of view it is personal property." 20 Am. & Eng. Enc. Law, p. 974; 3 Pom. Eq. Jur., p. 1187, note; *Harmon* v. *Short,* 8 Smedes, & M., 433; *Hill* v. *Robertson,* 24 Miss., 368; *Buckley* v. *Daley,* 45 Miss., 338,

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Brief for appellant.

345; *Carpenter* v. *Bowen,* 42 Miss., 28, 49; *Buck* v. *Raines,* 52 Miss., 271. "The interest of the mortgagee [in land] is a chattel, and is devolved on the holder of the note, passed on delivery or indorsement." *Clark* v. *Wilson,* 53 Miss., 129.

"The above authorities will show that sometimes it is called real estate, and sometimes a chattel. The equity of redemption is a distinct estate from that vested in the mortgagee before or after condition broken. It is devisable and alienable, like other interests in real property." *Clark* v. *Reyburn,* 8 Wall, 322, 19 L. Ed., 354; *Beverly* v. *Barnitz,* 55 Kan., 482, 42 Pac., 725, 31 L. R. A., 74, 49 Am. St. Rep., 269. "For the purposes of taxation, the mortgagee's interest in the land is realty, and may be taxed where the lands lie, regardless of the domicile of the owner." *Savings and Loan Society* v. *Multnomah County,* 169 U. S., 429, 18 Sup. Ct., 392, 42 L. Ed., 803; *New Orleans* v. *Stemple,* 175 U. S., 321, 20 Sup. Ct., 110, 44 L. Ed., 174; *Walker* v. *Jack,* 88 Fed., 578, 31 C. C. A., 462; *Colbert* v. *Board,* 60 Miss., 142.

In the case of *Edward M. Allen, Treasurer,* v. *National State Bank,* reported in 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517, the supreme court of Maryland held as follows:

"The questions to be considered are, first, whether section 146a of Acts 1896, p. 160, ch. 120 (Poe's Supp. Code Pub. Gen. Laws, p. 551, art. 81, sec. 146a), so far as it taxes the interest covenanted to be paid in mortgages on land in Maryland held or owned by nonresident mortgagees, citizens of other states, is a valid and constitutional exercise of the taxing power of the Legislature; and, second, if the Legislature has such power, did it intend to exercise it by the passing of the act above mentioned? No question is made as to the amount of tax levied in this case, but the question is whether any such tax can be levied. The provisions of section 146a are as follows: 'All mortgagees or assignees holding mortgages of record in

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Brief for appellant.

this state shall annually pay a tax of eight per centum upon the gross amount of interest covenanted to be paid each year to said mortgagee, to be collected by the proper authorities as other taxes for county and state purposes in the several counties, ... and the tax hereby levied shall each year be paid in the county . . . . where the greater portion of the property covered by the mortgage is located.' In the first place, this court has already held that the act in question is valid in respect to mortgagees residing in this state; the lands mortgaged being also located here. In the case of *Faust* v. *Building Association,* 84 Md., 186, 35 Atl., 890, we held 'that the power of the legislature to tax mortgage debts has been frequently exercised, and it has been recognized by the decisions of this court. . . . . If any doubts,' continues the court, 'have hitherto existed, they are set at rest by sec. 51, art. 3, of the constitution, as amended by Acts 1890, p. 458, ch. 426.' The amendment is in these words: 'But the general assembly may by law provide for the taxation of mortgages upon property in this state and the debts secured thereby in the county or city where such property is situated.' The method of carrying out this constitutional provision was also approved in the same case. 'The tax levied,' said Bryan, J., delivering the opinion of the court, 'cannot be considered as excessive or unjust. Eight per centum on the interest, even if it should be 6 per centum, would be 48 cents on the $100 of principal. . . . . The adjustment shows on its face a studious effort to discharge a public duty in a spirit of justice or moderation. The assessment and levy were made in the legitimate exercise of the powers of the Legislature in relation to subjects confined to its discretion, and it is our duty to declare them valid.' It is true that the tax is levied upon the interest, and not upon the mortgage debt; but this method which we approved in Faust's Cause, *supra,* is only another method of taxing the latter, and the rate of taxation is determined by the percentage of the interest. Having, therefore,

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Brief for appellant.

determined that the act in question is valid so far as it applies to resident mortgagees holding mortgages on land in Maryland, is it valid as to nonresident mortgagees owning mortgages of the same character? Upon general principles, it would seem that there ought to be no difficulty in answering this question in the affirmative. It is one of the axioms of the law of taxation that the state has the right to tax all persons and all properties of every kind within its jurisdiction. *McCulloch* v. *Maryland,* 4 Wheat., 316, 4 L. Ed., 579. But it is contended that the interest of a mortgagee is in the nature of a chose in action, and that according to the well-settled law, here and elsewhere, such property must be assessed and taxed to the owner where he has his domicile. The case of *Appeal Tax Court* v. *Patterson,* 50 Md., 366, is cited to sustain this proposition. It is there said that property of a nonresident cannot be taxed, unless it has an actual situs within this state, so as to be under the protection of its laws. But what has been actually decided in that case was that a resident of Maryland, owning stock, bonds, and other certificate of public debt, issued by other sovereign states or by municipalities created by them, which are exempted by the states issuing them, may be taxed in this state. Conceding, for the present, that the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and 'yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined, and whenever the legislative intent is manifest, that this legal fiction should not operate.' *Green* v. *Van Buskirk,* 7 Wall., 139, 19 L. Ed., 109; *Bristol* v. *Washington Co.,* 177 U. S., 141, 20 Sup. Ct., 585, 44 L. Ed., 701; *Hervey* v. *Rhode Island Works,* 93 U. S., 664, 23 L. Ed., 1003; *St. Louis* v. *Ferry Co.,* 11 Wall., 428, 20 L. Ed., 192. In *Patterson's Case, supra,* it is said: 'The general rule, *"Mobilia sequuntur personam,"* relied on by appellant, is far from being of universal applica-

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Brief for appellant.

tion, and has been qualified by numerous exceptions in cases of taxation.' The act we are considering expressly provides that the interest of the mortgagee shall be taxed, not where he resides, but in the county or city where the mortgaged land is located. So that the case of *Latrobe* v. *Baltimore City,* 19 Md., 13, and that of *Baltimore City* v. *Stirling,* 29 Md., 49, cited to maintain the proposition that a mortgage debt is taxable at the residence of the creditor, are not applicable here. And so there are many instances that can be cited where the express provisions of the tax laws take the place of this fiction. Thus, in this and many other states, shares of the capital stock and corporations, which are choses in action, and which are owned by nonresidents, are taxed by express provisions of statutes where the corporation is located, and not where the owner resides. In the case of *Savings Society* v. *Multnomah Co.,* 169 U. S. 421, 18 Supt. Ct. 392, 42 L. Ed. 803, this very question appears to have been disposed of. Justice Gray, in delivering the opinion of the court, said: 'By the law of Oregon, as of some other states of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates a lien or incumbrance as security for the debt. The right of possession, as well as the legal title, remains in the mortgagor, both before and after conditions broken, until foreclosure. Notwithstanding this, it has been held, both by the Supreme Court of Oregon and by the Circuit Court of the United States for the District of Oregon, that that State has the power to tax mortgages of land there, though owned and held by citizens and residents of other States.' The conclusion reached by the Supreme Court of the United States in the case just cited is that 'although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest, and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be

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Brief for appellant.

taxed to its owner, whether resident or nonresident, in the State where the land is located, without contravening any provision of the Constitution of the United States.' In meeting the objection here relied on, it is said in *Mumford* v. *Sewall*, 11 Or. 67, 4 Pac. 585, 50 Am. Rep. 462, one of the cases cited by Justice Gray in *Savings Society* v. *Multnomah Co., supra:* 'Concede that the debt accompanies the respondent's person, and is without the jurisdiction of the state; but the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon as absolutely as the land it binds. Since the power of the state over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is constitutional limitation to the contrary.'

"It is suggested by the defendant that the decision of the supreme court of the United States, based upon the Oregon statute, has no analogy to the question before us, first, because that statute in express terms 'forbids any taxation of the promissory note or other evidence of debt secured by the mortgage, and with equal distinctness provides for the taxation, as real estate, of the mortgagee's interest in the land;' second, because that state authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor. Nor does our statute, the validity of which is here challenged, tax the evidence of debt secured by the mortgage; for in this case there is none. The thing taxed is the interest, which, as we have said, is as much a part of the mortgage as the debt itself. Nor do we think that the fact that our statute does not in express terms tax the mortgagee's interest in the real estate as land affects its validity; for personal property, as the Supreme court of the United States 'has declared again and again, may be taxed at the place where the property is situated, even if the owner is neither a citizen nor resident.' *Savings Society* v. *Multnomah Co., supra.* The situs of the mortgagee's interest

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Brief for appellant.

for the purpose of taxation is fixed in our act in Harford county, where the land is located. Again, the fact that our statute makes no provision for deducting the mortgage debt from any assessment upon the mortgagor is rather an objection to its justice and fairness than to its validity. Statutes taxing the land to the mortgagor and the mortgage debts to the mortgagee have been frequently declared valid in Maryland and in other states. *Appeal Tax Court of Baltimore City* v. *Rice*, 50 Md., 319; *Baltimore City* v. *Canton Co.*, 63 Md., 237; *The Tax Cases*, 12 Gill & J., 117; *Allen* v. *County Commissioners Harford County*, 74 Md. 294, 22 Atl. 398; *Augusta Bank* v. *Augusta*, 36 Me. 259; *Ala. Ins. Co. v. Lott*, 54 Ala. 499; *Goldgart* v. *People*, 106 Ill. 25. The case of *Bristol* v. *Washington County*, 177 U. S. 139 Sup. Ct. 585, 44 L. Ed. 701, also fully sustains and affirms *Savings Society* v. *Multnomah County*, *supra*. The attempt to distinguish *Bristol* v. *Washington County* from the case at bar is not successful; for in our opinion the provisions of our act fix the situs of the mortgage here taxed as clearly and as fully as did the act of the parties there, by placing the mortgage notes in the hand of the agent for collection and reloaning. In delivering the opinion of the court, Fuller, C. J., said that the withdrawal of the notes from the hands of an agent and the revocation of his power of attorney did not change the situs of the mortgagee's interest for taxation. 'Persons are not permitted,' he said, 'to avail themselves for their own benefit of the laws of a state in the conduct of business within its limits, and then to escape from their due contribution to the public needs through taxation of this sort, whether taken for convenience or by design.'

"(2) We have thus far assumed that the interest of a mortgagee is a chose in action, or something less than an interest in the land. In this state, however, it has long been held that a mortgagee takes something more than a mere lien. Thus, in *Cahoon* v. *Miers*, 67 Md. 576, 11 Atl. 278, Judge Miller, re-

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Brief for appellant.

ferring to the opinion of our predecessors in the case of *Evans & Inglehart* v. *Merriken,* 8 Gill & J. 39, said 'that a mortgage does something more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence; . . . that the legal estate is defeasible at law upon the payment of the mortgage debt at the time stipulated, but if this is not done it becomes indefeasible at law and only defeasible in equity, ... but at law the title all the while is in the mortgagee. That decision,' continues Judge Miller, 'has been acquiesced in and recognized as the law of the state for more than half a century, and we see no good reason for overruling it now.' In commenting upon *Cahoon* v. *Miers,* in *Duval* v. *Becker,* 81 Md. 547, 32 Atl. 308, Chief Justice McSherry said: 'As between the mortgagor and the mortgagee, therefore, the doctrine that the mortgagor is regarded as the real owner does not, and in view of the quality of the estate conveyed by the mortgage cannot, obtain to the extent of permitting the mortgagor by his own act to exempt from the lien and operation of the mortgage any part of the mortgaged property. It will thus be seen that the interest of the mortgagee is treated by the courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security.' *Hutchins v. King,* 1 Wall. 58, 17 L. Ed. 544. 'But,' as was remarked by Justice Gray in *Savings Society Case, supra,* 'if the law treats the mortgagee's interest in the land as real estate, for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation.' As we have already seen, our decisions, for his protection, do so treat it, and our act gives a fixed situs in Hartford county, where it was taxed. But in this state the mortgagee at law becomes vested with the legal estate, and therefore he may maintain an action of ejectment. *Ahern* v. *White,* 39 Md. 422,

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Brief for appellant.

423. If this be so, then at law the mortgagor has a title to the interest in the land, and therefore has property in the state subject to taxation. The tax imposed by the act of 1896 we are considering does not impose the tax on a nonresident, but the money due on the mortgage is taxed. *Tax Cases,* 12 Gill & J., 117; *Allen* v. *Commissioners of Hartford County, supra; Bank Tax Case,* 2 Wall. 200, 17 L. Ed. 793. Therefore, whether the interest of a mortgagee be held to be merely a chose in action, or lien, or an interest and estate in the mortgaged land, it would seem to be clear that it is taxable in the state where the land is located. A different view was expressed in the case of *State Tax,* etc., 15 Wall. 300, 21 L. Ed. 179; but Justice Gray says of that case in the *Savings Society Case, supra:* 'The remarks in the opinion . . . . went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of the supreme court of the United States.'

"(3) The only remaining question to be considered is, assuming that the Legislature has the power, did it intend by Acts 1896, p. 160, c. 120, § 146a, to levy a tax upon the property of nonresident mortgagees? Certainly nothing can be found in the language of the act to indicate that any exception or exemption was intended. The language is comprehensive and general, and includes nonresident as well as resident mortgagees. In the construction of revenue laws it is well settled that every presumption is to be made in favor of the state, and, if freedom of taxation or an exemption is claimed, the burden is on the taxpayer to show clearly that either the one or the other exists. Inasmuch as we have held that it is in the power of the legislature to tax the interest of nonresident mortgagees, we think it follows, both from general and comprehensive terms of the statute, as well as from the result that would follow if we should hold otherwise; that all mortgages are included; for it is apparent that if we hold that only resident

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Brief for appellant.

mortgagees and their resident assigns can be taxed under our present law, the law itself would be rendered nugatory by the assignment of all mortgages to nonresidents."

In the case of *Savings & Loan Society* v. *Multnomah County,* decided by the supreme court of the United States, it was held as follows (Mr. Justice Gray delivering the opinion of the court):

"This was a bill in equity, filed in the circuit court of the United States for the district of Oregon by the savings and loan society against Multnomah county, a public corporation in the state of Oregon, and one Kelly, the sheriff and *ex officio* tax collector of that county, and a citizen of that state, showing in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the plaintiff, at its office, in the city of San Francisco and state of California, amounting in all to the sum of $531,000, and to further secure the same debts executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah county; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and had ever since been without the state of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882 (Laws 1882, p. 64), taxes were imposed upon all the taxable property in Multnomah county, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect same upon execution, and he advertised for sale all the mortgages aforesaid; and that the statute was in violation of the fourteenth amendment of the constitution of the United States, as depriving the plaintiff of its property without due process of law, and

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Brief for appellant.

denying to it the equal protection of the laws. The bill prayed for an injunction against the sale, and for a decree declaring that the statute was contrary to the provisions of the constitution of the United States, and therefore of no effect, and that all the proceedings before set out were null and void, and for further relief. The defendant demurred generally, and the court sustained the demurrer and dismissed the bill. *Savings & Loan Soc.* v. *Multnomah County* (*C. C.*), 60 Fed., 31. The plaintiff appealed to this court.

"The ground upon which the plaintiff seeks to maintain this suit is that the tax act of the state of Oregon of 1882 (Laws 1882, p. 64), as applied to the mortgages owned and held by plaintiff in California of lands in Oregon, is contrary to the fourteenth amendment of the constitution of the United States, as depriving the plaintiff of its property without due process of law and denying to it the equal protection of the laws. The statute in question makes the following provisions for the taxation of mortgages: By section 1 'a mortgage, deed of trust, contract or obligation whereby land or real property, situated in no more than one county in this state, is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as real property.' By section 2 'the mortgage, together with such debt, shall be taxed to the owner of such security and debt in the county, city or district in which the land or real property affected by such security is situated,' and may be sold, like other real property, for the payment of taxes thereon. By section 3 that person is to be deemed the owner who appears to be such on the record of the mortgage, either as the original mortgagee or as the assignee by transfer made in writing upon the margin of the record. By section 4 no payment on the debt so secured is to be taken into consideration in assessing the tax, unless likewise stated upon the record; and the debt and mortgage are to be assessed for the full amount appearing by the record to be

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Brief for appellant.

owing, unless in the judgment of the assessor the land is not worth so much, in which case they are to be assessed at their real cash value. By sections 5, 6 and 7 it is made the duty of each county clerk to record, on the margin of the record of any mortgage, when requested so to do by the mortgagee or owner of the mortgage, all assignments thereof or payments thereon, and to deliver annually to the assessor abstracts containing the requisite information as to unsatisfied mortgages recorded in this office. By section 8 a debt secured by a mortgage of land in a county of this state 'shall, for the purpose of taxation, be deemed and considered as indebtedness within this state, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner as other indebtedness within the state is deducted.' And by section 9 'no promissory note or other instrument in writing, which is the evidence of a debt that is wholly or partly secured by land or real property situated in no more than one county in this state, shall be taxed for any purpose in this state; but the debt evidenced thereby and the instrument by which it is secured shall, for the purpose of assessment and taxation, be deemed and considered as land or real property, and together be assessed and taxed as hereinbefore provided.' Laws Or., 1882, pp. 64-67. All these sections are embodied in Hill's Ann. Code Or., secs. 2730, 2735, 2738, 2753, 2756.

"The statute applies only to mortgages of land in not more than one county. By the last clause of section 3 all mortgages 'hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void.' The mortgages now in question were all made since the statute, and were of land in a single county; and it is not suggested in the bill that there existed any untaxed mortgage of lands in more than one county. The statute in terms provides that 'no promissory note or other instrument in writing, which is the evidence of' the debt secured by the mortgage,

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Brief for appellant.

'shall be taxed for any purpose within this state'; but the debts and mortgages 'shall, for the purpose of assessment and taxation, be deemed and treated as land or real property' in the county in which the land is situated, and be there taxed, not beyond their real cash value, to the person appearing of the record to be the owner of the mortgage. The same statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgage, and does not provide for both taxing to the mortgagee the money secured by the mortgage and also taxing to the mortgagor the whole mortgaged property, as did the statutes of other states, the validity of which was affirmed in *Augusta Bank* v. *Augusta,* 36 Me., 255, 259; *Ala. Ins. Co.* v. *Lott,* 54 Ala., 499; *Appeal Tax Court* v. *Rice,* 50 Md., 302, and *Goldgart* v. *People,* 106 Ill., 25. The right to deduct from his assessment any debts due from him within the state is secured as well to the mortgagee as to the mortgagor by a provision of the statute of Oregon of October 25, 1880 (unrepealed by the statute of 1882, and evidently assumed by section 8 of the statute to be in force), by which it shall be the duty of the assessor to deduct the amount of the indebtedness, within the state, or any person assessed from the amount of his or her taxable property.' Laws Or., 1880, p. 52; Hill's Ann. Code Or., sec. 2752.

"Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed as real estate to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage, and is considered as indebtedness within the state for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the state is deducted; and

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Brief for appellant.

the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the state. The result is that nothing is taxed but real estate mortgaged; the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between the mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws. No question between the mortgagor and the mortgagee, arising out of the contract between them, in regard to the payment of taxes or otherwise, is presented or can be decided upon this record.

"The case, then, reduces itself to the question whether this tax act, as applied to the mortgages owned by citizens of the other states and in their possession outside of the state of Oregon, deprives them of their property without the due process of law. By the law of Oregon, indeed, as of some other states of the Union, a mortgage of real property does not convey the title to the mortgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. Gen. Laws Or., 1843-1872, p. 177, sec. 323; Hill's Ann. Code Or., sec. 326; *Anderson* v. *Baxter,* 4 Or., 105, 110; *Semple* v. *Bank of British Columbia,* 5 Sawy., 88, Fed. Cas. No. 12659; *Id.,* 5 Sawy., 394, Fed. Cas. No. 12660; *Teal* v. *Walker,* 111 U. S., 242, 4 Sup. Ct., 420, 28 L. Ed., 415; *Sellwood* v. *Gray,* 11 Or., 534, 5 Pac., 196; *Watson* v. *Dundee Mortgage Co.,* 12 Or., 474, 8 Pac., 548; *Thompson* v. *Marshall,* 21 Or., 171, 27 Pac., 957; *Adair* v. *Adair,* 22 Or., 115, 29 Pac., 193. Notwithstanding this, it has been held, both by the supreme court of the state and the circuit court of the United States for the district of Oregon, that the state has the power to tax mortgages, though owned and held by citizens of other states, of

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Brief for appellant.

lands in Oregon. *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462; *Dundee Mortgage Trust Inv. Co.* v. *School District No.* 1 *of Multnomah County,* 10 Sawy., 52, 19 Fed., 359; *Crawford* v. *Linn County,* 11 Or., 482, 5 Pac., 738; *Dundee Mortgage Trust Inv. Co.* v. *Parrish,* 11 Sawy., 92, 24 Fed., 197; *Poppleton* v. *Yamhill County,* 18 Or., 377, 383, 23 Pac., 253, 7 L. R. A., 449; *Savings & Loan Society* v. *Multnomah County* (*C. C.*), 60 Fed., 31. In *Mumford* v. *Sewall,* Judge Waldo, delivering the opinion of the court, said: 'All subjects, things as well as persons, over which the power of the state extends, may be taxed. A mortgage, as such, is incorporeal property. It may be the subject of taxation. Concede that the debt accompanies the respondent's person and is without the jurisdiction of the state. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon as absolutely as the land it binds. Since the power of the state over the mortgage is as exclusive and complete as the land mortgaged, the mortgage is subject to taxation by the state, unless there is a constitutional limitation to the contrary.' 11 Or., 68, 69, 4 Pac., 585, 50 Am. Rep., 462. 'In *Mumford* v. *Sewall,*' said Judge Deady, in *Dundee Mortgage Co.* v. *School District,* 'the court held that a mortgage upon real property in this state is taxable by the state, without reference to the domicile of the owner or the situs of the debt or note secured thereby. And this conclusion is accepted by the court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage upon real property in this state, whether considered as a conveyance of the same, or merely a contract giving him lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the state, and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or

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Brief for appellant.

power over land; and the mere fact that the instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial.' 10 Sawy., 63, 64, 19 Fed., 359.

"The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable. *McCulloch* v. *Maryland,* 4 Wheat., 316, 429, 4 L. Ed., 579. Personal property, as the court has declared again and again, may be taxed, either at the domicile of the owner or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. *Tappan* v. *Merchants' Bank,* 19 Wall., 490, 499, 22 L. Ed., 189; *State R. R. Tax Cases,* 92 U. S., 575, 607, 23 L. Ed., 663; *Coe* v. *Town of Errol,* 116 U. S., 517, 524, 6 Sup. Ct., 475, 29 L. Ed., 715; *Pullman Car Co.* v. *Pennsylvania,* 141 U. S., 18, 22, 27, 11 Sup. Ct., 876, 35 L. Ed., 613. The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicile, or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs. *Firemen's Ins. Co.* v. *Commonwealth,* 137 Mass., 80, 81; *State* v. *Runyon,* 41 N. J. Law, 98, 105; *Darcy* v. *Darcy,* 51 N. J. Law, 140, 145, 16 Atl., 160, 2 L. R. A., 350; *Peeple* v. *Smith,* 88 N. Y., 576, 585; *Common Council* v. *Assessors,* 91 Mich., 78, 92, 51 N. W., 787, 16 L. R. A. 59.

"The plaintiff much relied on the opinion delivered by Justice Field in *Cleveland, Painesville & Ashtabula R. R.* v. *Pennsylvania,* reported under the name of *'Case of State Tax on Foreign-Held Bonds,'* 15 Wall., 300, 323, 21 L. Ed., 179.

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Brief for appellant.

It becomes important, therefore, to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage of its entire road in both states; and the tax imposed by the state of Pennslyvania, which was held by a majority of this court to be valid, was a tax upon the railroad, or upon the bondholders, solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the supreme court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a nonresident is as much beyond the jurisdiction of the state as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and the supreme court of Pennsylvania. The court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by an act of congress in the distribution of the debtor's estate. *U. S.* v. *Hooe,* 3 Cranch, 73, 2 L. Ed., 370; *Thelusson* v. *Smith,* 2 Wheat,, 396, 426, 4 L. Ed., 271; *Conard* v. *Atlantic Ins. Co.,* 1 Pet., 386, 441, 7 L. Ed., 189. In *Hutchins* v. *King,* 1 Wall., 53, 58, 17 L. Ed. 544, Justice Field, delivering the opinion of the court, said 'that the interest of the mortgagee is now generally treated by the courts of law as real estate only so far as it may be necessary for the protection of the mortgages and to give him the full benefit of his security.' See, also, *Waterman* v. *Mackenzie,* 138 U. S., 252, 258, 11 Sup. Ct., 334, 34 L. Ed., 923. If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation. The leading quotation in 15 Wall., 323, 21 L. Ed., 179, from the Pennsylvania Reports, is this general statement

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Brief for appellant.

of Justice Woodward: 'The mortgagee has no estate in the land, no more than the judgment creditor. Both have liens upon it, and no more than liens.' *Witmer's Appeal,* 45 Pa., 455, 463, 84 Am. Dec., 505. Yet the same judge, three years later, treated it as unquestionable that a mortgage of real estate in Pennsylvania was taxable there, without regard to the domicile of the mortgagee. *Maltby* v. *Reading & Columbia R. R.,* 52 Pa., 140, 147.

"The effect of a mortgage as a conveyance of an interest in real estate in Pennsylvania has been clearly brought out in two judgments delivered by Justice Strong, the one in the supreme court of Pennsylvania and the other in this court. Speaking for the same judges who decided *Witmer's Appeal,* above cited, and in a case decided less than two months previously, reported in the same volume, and directly presenting the question of adjudication, Justice Strong said, of mortgages of real estate: 'They are in form defeasible sales, and in substance grants of specific security, or interest in the land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, with all its incidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title.' *Britton's Appeal,* 45 Pa., 172, 177, 178. It should be remembered that in the courts of the state of Pennsylvania, for want of a court of chancery, an equitable title was held sufficient to sustain an action of ejectment. *Simpson's Lessee* v. *Ammons,* 1 Bin., 175, 2 Am. Dec., 425; *Youngman* v. *Elmira & Williamsport Ry.,* 65 Pa., 278-285, and cases there cited.

"Again, in an action of ejectment, commenced in the circuit court of the United States for the district of Pennsylvania, Justice Strong, delivering the unanimous opinion of this court, said: 'It is true that a mortgage is in substance but a security

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Brief for appellant.

for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate; but as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Courts of law have always regarded the title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of condition, may entertain or maintain ejectment for the land.' Applying these principles, it was held that one applying under the mortgage, having only an equitable title, could not maintain an action of ejectment against one in possession under the mortgagee, while the mortgage remained in existence, or until there had been a redemption, because an equitable title would not sustain an action of ejectment in the courts of the United States. *Brobst* v. *Brock,* 10 Wall., 519, 529, 530, 19 L. Ed., 1002.

"In a later case in Pennsylvania, Chief Justice Agnew, upon a full review of the authorities in that case, said: 'Ownership of the debt carries with it that of the mortgage; and its assignment, or succession in event of death, vests the right to the mortgage in the assignees or the personal representative of the deceased owner. But there is a manifest difference between the debt, which is a mere chose in action, and the land which secures its payment. Of the former there can be no possession, except that of the writing which evidences the obligation to pay; but of the latter, the land or pledge, there may be. The debt is intangible; the land, tangible. The mortgage passes to the mortgagee the title and right of possession, to hold till payment shall be made.' *Tryon* v. *Munson,* 77 Pa., 250, 262.

"In *Kirtland* v. *Hotchkiss,* 42 Conn., 426, 19 Am. Rep., 546,

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Brief for appellant.

affirmed by this court in 100 U. S., 491, 25 L. Ed., 558, the point adjudged was that debts to persons residing in one state might, for the purpose of taxation, be regarded as situated at the domicile of the creditor. But the question whether the mortgage could be taxed there only was not involved in the case, and was not decided by the supreme court of Connecticut or by this court. In many other cases cited by the appellant, there was no statute expressly taxing mortgages at the situs of the land; and, although the opinion in some of them took in a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality of a statute — of the intention, not the power of the legislature. Such were *Arapahoe County* v. *Cutter,* 3 Colo., 349; *City of Davenport* v. *Miss. & Mo. R. R.,* 12 Iowa, 539; *Latrobe* v. *Baltimore,* 19 Md., 13; *People* v. *Eastman,* 25 Cal., 601; *State* v. *Earl,* 1 Nev., 394; *People* v. *Smith,* 88 N. Y., 576; *Grant* v. *Jones,* 39 Ohio St., 506; *State* v. *Smith,* 68 Miss., 79, 8 South, 294; *Holland* v. *Silver Bow Commissioners,* 15 Mont., 460, 39 Pac., 575, 27 L. R. A., 797.

"The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage, and with equal distinctness provides for the taxation as real estate of the mortgage in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or nonresident) in the state where the land is situated, without contravening any proviso of the constitution of the United States."

See *American Refrigerator Transit Co.* v. *Hall,* 174 U. S., 74, 19 Sup. Ct., 599, 43 L. Ed., 899.

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Brief for appellant.

"The situs of personal property does not follow the domicile of its owner for purposes of taxation." *City of New Albany* v. *Meekin,* 3 Ind., 481, 56 Am. Dec., 522; Cooley on Taxation, secs. 14, 15; *Witherspoon* v. *Duncan,* 4 Wall., 210, 18 L. Ed., 339; *Tazewell County* v. *Davenport,* 40 Ill., 197. "There is nothing poetical about tax laws. Wherever they find property, except what is devoted to public and charitable uses, they claim a contribution for its protection, without any special respect to the owner or his occupation, and without reflecting much on generosity or courtesy." *Finley* v. *City of Philadelphia,* 32 Pa., 381. "The fiction that personal property follows the owner's domicile yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing be examined." *Green* v. *Van Buskirk,* 7 Wall., 139, 150, 19 L. Ed., 109.

We admit that the authorities from Mississippi, cited *supra* in this brief, show that the interest of the mortgagee or *cestui que* trust is treated by the courts of law as chattel, and is treated as real estate only so far as it may be necessary for the protection of the mortgagee. The question, however, is put at rest that our own courts treat this interest or estate as "property." It can never be denied that I may subject, here in Mississippi, at least in a court of equity, this estate or interest of the mortgagee to the payment of his debts. If a man living in Tennessee, or elsewhere beyond the jurisdiction of Mississippi, has a mortgage on lands in Mississippi, or be indebted to a citizen of this state, certainly it cannot be denied that the citizen can at least call upon a court of equity to subject this interest of the foreign mortgagee to the payment of the debt by sale of his interest in the mortgage. *Serviss* v. *Washtenaw Circuit Judge* (Mich.), 74 N. W., 310, 72 Am. St. Rep., 507. See note to *National Bank* v. *Furtick* (Del.), 69 Am. St. Rep., 119. In none of these Mississippi cases, however — in fact, never in the history of this state — has the question been before presented of whether or not this estate or interest of the nonresident mort-

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Brief for appellant.

gagee is to be treated, in favor of the state, as realty, or personalty, for that matter, for the purpose of taxation, and having its situs in this state. We are, therefore, upon new ground in this question.

'I repeat that if this interest, for the purpose of taxation, is property, its situs must be here where the mortgage is.' For the reason given by the supreme court of the United States in the case last quoted, in speaking of a foreign mortgage, in *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462: "The security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon as absolutely as the land it binds. Since the power of the state over the mortgage is as complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is constitutional limitation to the contrary." And, as in the Maryland case above: "Conceding, for the present, that the interest of the mortgage is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of the law, and yields whenever it is necessary, for the purpose of justice, that the actual situs should be examined. . . . . In *Patterson's Case,* 50 Md., 366, it is said: 'The general rule, "*Mobilia sequuntur personam,*" relied on by the appellant, is far from being of universal application, and has been qualified by the numerous exceptions in cases of taxation.'" The case of *Savings Society* v. *Multnomah County,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, and of *Allen* v. *National State Bank,* 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517, with the authorities there cited, we say, answer every proposition and objection of the liability of this property to taxation that could possibly be made by the appeal in this case. Our state statute, above quoted, subjects all property to taxation. If this estate is property, whether real or personal, it could not exist or have a situs anywhere on earth than in Mississippi, where it is recorded, and

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Brief for appellant.

where the lands conveyed by it lie, and where alone it can be enforced. The demurrer admits the situs is in Mississippi. It is just and right that the foreign creditor, who lends money in Mississippi, and takes securities which he is compelled to call upon our courts to enforce for him, should contribute his share to the public burden. This is bound to be true, whatever we may think of the public policy of exempting from taxation moneys loaned in the state with a view of reducing interest rates. "Taxation is the rule; exemption is the exception." This is the maxim of the law of taxation. No statute exists in this state exempting this class of property. The state taxes "solvent securities" of her own citizens, and why should she not tax the "solvent securities" of nonresidents, which securities are here within the jurisdiction of her taxing laws?

It may be urged that the land is already taxed to the owner—that is, the mortgagor—and this necessarily embraces all interest in it. This latter premise is a pure assumption. Who can say that the mortgagor, in rendering the land for taxation, did not deduct the existing mortgages on it? Again, it would not be double taxation, or, at all events, such double taxation as would be illegal taxation, to tax both, as in the case of taxing the property of corporations and also taxing the shares of the capital stock. All double taxation is not illegal. This court held, in the case of *Fox* v. *Pearl River Lumber Co.*, 80 Miss., 1, s. c., 31 South., 583, recently decided, that the separate interest of the timber owner in land might be separately assessed and taxed, and there can be no reason why the interests, respectively, of the mortgagor and mortgagee, should not be separately assessed and taxed. If "property," it ought to be taxed, and is expressly made liable to taxation by the provision of our statutes; and I respectfully submit that, if we have not in the past assessed and collected taxes on this property of the nonresident in our state, this is no good reason why we should not do it now.

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Brief for appellant.

It may be urged by appellee's counsel, but for the statute in Oregon and Maryland, that these two cases cited above would not have been so decided; but a careful reading of the two cases will show that the legislative power to pass these statutes is put upon the distinct ground that this interest of the mortgagee in the lands mortgaged, through the security, is a distinct "property." And "it is one of the maxims of the law of taxation that the state has the right to tax all persons and all property of every kind within its jurisdiction." *McCulloch* v. *Maryland,* 4 Wheat., 316, 4 L. Ed., 579. We say sections 3744, 3755 and 3757 of the code of Mississippi of 1892 make it manifest that the legislative intent is that this property shall be taxed here in Mississippi, because by it all property must be taxed. We need no other statute, therefore, than sections 3744, 3755 and 3757, *supra.*

It is conservatively estimated that there is today in the neighborhood of $75,000,000 worth of this class of property in Mississippi on which not one solitary dollar of taxes has ever been paid in this state, or any other state of this Union, or anywhere else in this world. This large proportion of the property of the state, safeguarded and made valuable by the state's constitution and laws, contributes absolutely nothing to the support of the government, without which it would be worthless. This is not right, and justice, fair play, and "equal protection of the laws" demand that it shall pay taxes. It does not lie in the mouth of the appellee to invoke the fourteenth amendment of the constitution of the United States. That question is settled against it by *Savings Society* v. *Multnomah County, supra.*

The importance of this case, I am sure, will excuse me with the court for further trespassing upon its patience in an endeavor to assist in the right solution of the question involved. A review of both sides of this question, and the authorities that may be cited, have reduced the propositions for solution, in my mind, to the following:

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Brief for appellant.

(1) There can be no doubt about the power of the legislature to tax the debts due to nonresidents by citizens of this state, in this state, or tax the interests of the nonresident mortgagee in the land conveyed, or to tax both the debt and the interest of the mortgagee together. The power of the legislature to localize these debts and mortgages, and tax them separately or together, cannot be questioned, I take it.

(2) I take it there can be no debate about the right of grantors and mortgagees to localize and fix by contract the situs of this property right, for the purpose of taxation.

(3) Does our scheme of taxation — do our statutes — fix the situs of these debts, or the interest of the mortgagees in the securities, in Mississippi, where they must be enforced, or has this been done by the act of the parties — the owners of these debts and securities — by their own acts?

To answer this question, let us examine our statutes. Section 112 of the constitution of the state of Mississippi provides "that taxation shall be uniform and equal throughout the state." Section 3744, Code 1892, subjects to taxation all "property" in this state, except the specific property enumerated as exempt. Section 3755, Code 1892, in the last paragraph thereof, provides: "And the assessor shall also assess the value of the (property) of all nonresident taxpayers of his county." Section 3757, Code 1892, provides: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks or other securities for money, or employed in any kind of trade or business shall be taxable," etc.

I maintain that here is the legislative intent of this state, to tax all property, whether owned by residents or nonresidents. Now, what is "property"? In its broadest sense and its legal sense, it necessarily means anything of value which belongs to a man, and this must include any legal right which he could

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Brief for appellant.

assert to anything he owns. By section 1513 of the code of 1892, "the term 'personal property,' when used in any statute, shall include goods, chattels, effects, evidences of rights of action, and all written instruments by which any pecuniary obligation, or rights, title or instrument in real or personal estate, shall be created, acknowledged, transferred, incurred, defeated, discharged, or diminished." Section 1514 of the code of 1892 provides: "The term 'property,' when used in any statute, includes 'personal property,' as defined in the last preceding section, and also every estate, interest and right in lands, tenements and hereditaments." I do not care, therefore, if our supreme court has said, in *Beckett* v. *Dean*, 57 Miss., 232, that "a deed of trust to secure a debt is but a security, an incumbrance, and not an estate, legal or equitable, in the beneficiary," etc. I admit that this interest of the beneficiary or the mortgagee may not be sold under execution, and, in all controversies between the creditors and such beneficiaries and mortgagees and themselves, that the above decision, and that line of decision, is correct; but I say, for the purpose of taxation, this right of the beneficiary or mortgagee in the security is "property," the situs of which must be here where the lands lie and the mortgages are recorded. I further maintain that this act of taking the trust deed and mortgages on lands here, and recording them here, must necessarily localize and fix the situs here, and both the debts and the mortgagees, or at all events the interest of the mortgagees in the mortgages, is taxable here, regardless of his domicile.

To recur to our statutes: "All property must be taxed which is in this state. Property includes evidences and rights of action, and all written instruments by which any right, title or interest or estate is created." It is immaterial, wholly, whether you call the interest of the mortgagee or beneficiary in a deed of trust on lands here an estate, real or personal, or not, or whether you call it a mere security for the debt. It cannot be

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Brief for appellant.

denied that it is some sort of interest or right in the land, and that this is all that is necessary to subject it to taxation, provided that the interest or right is in Mississippi. Where on earth could this right or interest of the mortgagee or beneficary in the deed of trust have its situs or existence or value, except where the lands which are the subject of the security lie? To ask the question is to answer it. As was said by the supreme court of Oregon in *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462: "Concede that the debt accompanies the respondent's person, and is without the jurisdiction of the state; but the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon as absolutely as the land it binds. Since the power of the state over the mortgagee is as exclusive and complete as the land mortgaged, the mortgage is subject to taxation by the state (as an interest or right in the land), unless there is a constitutional limitation to the contrary." This Oregon case, and this express language in the judgment of that court, is confirmed in the case of *Edward M. Allen, Treasurer,* v. *State National Bank, etc.,* 92 Md., 509, 48 Atl. 78, 52 L .R. A., 760, 84 Am. St. Rep., 517, and the case of *Savings & Loan Society* v. *Multnomah County,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803; and on the subject of this Oregon case the supreme court of the United States say, in the case *supra,* " 'In *Mumford* v. *Sewall,*' said Judge Deady, in *Dundee Mortgage Co.* v. *School District,* 'the court held that a mortgage upon real property in this state is taxable by the state, without reference to the domicile of the owner or the situs of the debt or note secured thereby. And this conclusion is accepted by the court as the law of the case. Nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage on real property in this state, whether considered as a conveyance of the same, or merely as a contract giving him a lien thereon for his debt, and the power to enforce the payment thereof by sale of the prem-

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ises, is a contract affecting real property in the state, and dependent for its existence, maintenance, and enforcement on the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial.' "

Many years ago the right to tax debts due by citizens of the taxing state to citizens of foreign states was denied, on the ground that the evidence of the debt followed the domicile of the creditor, and was beyond the jurisdiction of the laws of the taxing state; but the various courts are beginning to consider, from the fact the right to collect the debt is dependent upon the laws of the taxing state, where the debtor lives, and inasmuch as the groundwork of the right to tax is dependent upon the protection afforded by the laws for the enforcement of the debt, that therefore the state has the right, by act of the legislature, to localize the debt and tax it where the debtor lives, rather than where the creditor lives. To support this proposition I cite from the very able brief of my associate, Mr. Scott, the case of *Blackstone* v. *Miller* (reported in the advance sheets of the United States Supreme Court Decisions of March 2, 1903) 23 Sup. Ct., 277, which case involved the construction of the statute of New York subjecting to taxation the transfer of any property that is in the state owned by a decedent who was a nonresident, and it was held that the debt due by the citizens of New York, just a simple debt, due by a firm in New York to such nonresident decedent, was subject to the tax, and I quote from the decision as follows:

"What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes; yet we are, nevertheless, subject to the criminal law, and it affords

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Brief for appellant.

one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of the legislation, and extend to debtors the rule still applied to slander, the *'actio personalis moritur cum persona,'* and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain the right of the foreign creditor would be gone. 'Power over the person of the debtor confers jurisdiction, we repeat; and, this being so, we perceive no better reason for denying the right of New York to impose a succession tax on the debts owed by its citizens than upon the tangible chattels found within the state at the time of death. The maxim, *"Mobilia sequuntur personam,"* has no more truth in the one case than in the other. When logic and the policy of the state conflict with a fiction due to historical tradition, the fiction must give way.'"

From the case of reappraisal of the estate of *John F. Houdayer* (N. Y.), 44 N. E., 718, 34 L. R. A., 235, 55 Am. St. Rep., 642, from same brief, I quote as follows:

"While the distribution of the fund belongs to the state where the decedent was domiciled, such distribution cannot be made until the administrator has come into the state to get this fund, possibly after resorting to the court for aid in reducing it to possession. The fund has a situs here, because it is subject to our laws. A reasonable test in all cases, it seems to us, is this: Where the right, whatever it may be, has a money value, and can be owned and transferred, but cannot be enforced or converted into money, against the will of the person owning the right, without coming into the state, it is property within this state for the purpose of a succession tax. Thus the right in question is property, because it is capable of being owned and transferred."

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Brief for appellant.

And from the case of *Re Estate of Worthington Romaine* (N. E.) 27 N. E., 759, 12 L. R. A., 401, I quote from the same brief as follows:

"Where, however, the money of a nonresident is invested in this state, as it was by Mr. Romaine in the bond and the mortgage in question, and in the deposits made by him in the savings bank, or where the property of a nonresident is habitually kept, even for safety, in this state, we think that the statute applies both in letter and spirit. Such property is within the state in every reasonable sense, receives the protection of its laws, and has every advantage from the government, for the support of which taxes are laid, that it would have if it belonged to the resident. We think that a fair construction of the act permits no distinction as to such property based simply upon the residence of the deceased owner. We have nothing to do with the policy of the statute, as our duty is discharged when we declare its meaning and apply it to the case in hand. The duty we discharge in this instance by adjudging that succession to personal property in question lately belonging to Worthington Romaine, a nonresident intestate, but invested or habitually kept by him in this state, is taxable under the colateral inheritance act, in so far as it passed to persons not excepted from its provisions."

I quote from the case in 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, from my original brief. Speaking of the interest of the mortgagee under the laws of Pennsylvania, and its liability to taxation, after the review of the decisions of Pennsylvania, the supreme court of the United States says: "The quotation in 15 Wall., 323, 21 L. Ed., 179, from the Pennsylvania Reports is this general statement of Justice Woodward: 'The mortgagee has no estate in the land, more than the judgment creditor. Both have liens upon it, and no more than liens.' *Witmer's Appeal,* 45 Pa., 455-463, 84 Am. Dec., 505. Yet the same judge, three years later, treated it

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Brief for appellant.

as unquestionable that a mortgage of real estate in Pennsylvania was taxable there, without reference to the domicile of the mortgagee." From the same case, 169 U. S., 421, 18 Sup. Ct., 392 42 L. Ed., 803, I quote as follows: "If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation."

It is conceded for the counsel of appellant that under the decisions of this court the nature of the interest of the mortgagee is the same in Mississippi as in Pennsylvania. To show there is a distinction between the manner in which the courts regard the interest or estate of the mortgagee in the land by the conveyance in all controversies between the mortgagee and his creditors, and the manner in which it regards this interest or estate for the purpose of taxation, I quote from my original brief and the cases cited there: "Conceding, for the present, the interest of the mortgagee is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of the law, and yields whenever it is necessary for the purpose of justice, the actual situs of the thing should be examined, and whenever the legislative intent is manifested this legal fiction should not operate." From my original brief, from the same case, I quote as follows: "In *Patterson's Case, supra,* it is said: 'The general rule, "*Mobilia sequuntur personam,*" relied upon by the appellant, is far from being of universal application, and has been qualified by numerous exceptions in cases of taxation.' The act we are considering expressly provides that the interest of the mortgage shall be taxed, not where he resides, but in the county or city where the mortgaged land is located. By the law of Oregon, as of some other states of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates a lien or incumbrance as security for the debt, and the right of posession, as well as the legal title, remains in the

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Brief for appellant.

mortgagor, both before and after condition broken, until foreclosure. Notwithstanding this, it is held, both in the supreme court of Oregon and by the circuit court of the United States for the district of Oregon, that the state has the power to tax mortgagees of the land there, though owned and held by citizens and residents of other states." And I quote, further, from the opinion of Chief Justice Fuller in *Bristol v. Washington County,* 177 U. S., 139, 20 Sup. Ct., 585, 44 L. Ed., 701: "Persons are not permitted," he said, "to avail themselves for their own benefit of the laws of the state in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

I say, therefore, that it seems perfectly conclusive that the state of Mississippi has not only the power to tax these debts and these mortgagees here in this state, without regard to the domicile of the owner, but that she has done so for two reasons: First, because this right or interest of the mortgagee in the lands is by our statutes "property," and property which can alone have existence where the lands lie in the state; and, second, because the parties taking these securities on the land lying there, where alone these securities have value and protection by our laws, have by their own act localized and fixed the situs, not only of the mortgages, but of the debts as well, in Mississippi. It is just possible that the decision of this court in *State* v. *Smith,* 68 Miss., 79, 8 South., 294, is antiquated, obsolete, and ought to be overruled. It is in conflict with all the modern decisions cited by appellant in this case. That rule—that is, that the debt follows the domicile of the owner—is true yet, and sound in every other controversy, than for the purpose of taxation. But for this purpose — that is, for taxation — I repeat, inasmuch as the right to tax and the obligation to pay taxes is dependent upon the protection to the right or property sought to be taxed, and inasmuch as these debts are

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Brief for appellant.

dependent for their enforcement, and therefore for their whole value, upon the laws of Mississippi, there is no sound reason why they may not be treated as property in this state, and taxed here. But whether correct in this or not, the case of *State* v. *Smith* has no application whatever to the case at bar from Copiah county, which seeks alone to tax the interest or estate of the mortgagee in the land. For this interest, "if property," does not follow the owner, and can have no other situs than in Mississippi, where the mortgage is recorded and where the lands lie.

D. A. Scott, for appellant.

The state of Mississippi has the power to tax the nonresident grantees and owners of the notes secured by the trust deeds sought to be taxed in this action. This question will be discussed in its various phases, and we will consider: (1) The inherent power of a sovereign state to tax any and all property it can bring under its power; (2) the particular right of the state of Mississippi to tax this character of property of nonresident debtors by virtue of the statutes of Mississippi and the law as announced by the court of last resort in that state; and (3) the right of the state to levy a tax, in this particular instance, as shown by the contract itself.

(1) The inherent power of a sovereign state to tax any and all property it can bring under its power.

Chief Justice Marshall, in the case of *McCulloch* v. *State of Maryland,* 4 Wheat., 428, 4 L. Ed., 579, said: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." Justice Marshall, in this case, referred to the state of Maryland. As will be remembered in that historical case, the question involved was whether or not the state of Maryland could tax a national

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Brief for appellant.

bank. The supreme court decided that it could not tax a national bank, for the sole and only reason that it was a part of the methods of the United States government for raising revenue. Relative to the power of the state to tax everything save the general government, the court said: "The power of the state may be exercised upon every object brought within its jurisdiction. It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is incident. All subjects over which the sovereign power extends are objects of taxation. . . . . The sovereignty of the state extends to everything which exists by its own authority, or is introduced by its permission. If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied." *McCulloch* v. *Maryland,* 4 Wheat., 428, 4 L. Ed., 579.

So it seems we have the best of authority for the position that whatever property can be found in the state of Mississippi is subject to the power of the state to tax it. "Taxation is emphatically an instance where the state has the right to throw aside all fiction and look at things as they are. Accordingly, states frequently tax tangible personalty of nonresidents where actually situate within their borders." This is quoted from the recent and well-considered work of Mr. R. C. Minor on the Conflict of Laws or Private International Laws.

Another view of the right of the state of Mississippi to tax this property after it has been located by its officers is the principle of taxation as to the correlative of protection. The property described in the deed of trust in this record is located in the state of Mississippi. The grantees in that deed have an equitable interest in real property in the state of Mississippi. If the state of Mississippi should withdraw its protection from that contract and from that property, the interest of the

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Brief for appellant.

grantees would at once become valueless. In sustaining this doctrine, Chief Justice Woodward, of the supreme court of Pennsylvania, in the case of *Maltby* v. *Reading & Columbia R. Co.*, 52 Pa., 140, said, in an opinion of the court which we will contend is authority upon almost every phase of this question, as follows: "The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a non-resident as to the resident owner, because civil government is essential to give value to any form of property, without regard to the ownership, and taxation is indispensable to civil government. . . . . It is apparent that the intrinsic and ultimate value of the loan as an investment rests on state authority — *i. e.*, the state which made it property and preserves it as property. Then it would seem that this sort of property, more than any other, ought to contribute to the support of the state government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creature of the legislative power, and all its functions derived from legislative grant, is so dependent upon the government, it lives and moves and has its being so entirely by favor of the government, that not only what it owns, but what it owes, is thought fit to be taxed." In speaking further upon this inherent right of the state, the same learned court said in the same case, at page 145: "The will of the legislature is final. The power of taxation, which is the corner-stone of the government, is lodged exclusively with the legislature, and depends wholly on the discretion of that department. . . . . So long as they confine themselves to that which is the nature of a tax law, these powers are subject to no judicial review. They are responsible only to the people." *Maltby* v. *Reading & Columbia R. Co.*, 52 Pa., 140, *et seq.*

In speaking of the case of *Maltby* v. *Reading & Columbia R. Co.*, 52 Pa., 140, from which the above quotation was taken,

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Brief for appellant.

Justice Field, of the United States supreme court, in the case of *State Tax on Foreign-Held Bonds,* 82 U. S., 300, 21 L. Ed., 179, said, at page 321, 82 U. S., 21 L. Ed., 179: "The case of *Maltby* v. *Reading & Columbia R. Co.,* decided by the supreme court of Pennsylvania, is relied upon by counsel in support of the tax question. The decision in that case goes to the full extent claimed, and holds that bonds of a corporation held by nonresidents are taxable in that state; but it is evident, from a perusal of the opinion of the court, that the decision proceeded upon the idea that the bond of the nonresident was itself property in the state, because secured by a mortgage on property there. It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizens of another state, but the constant practice is to tax property within our jurisdiction which belongs to nonresidents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere. There is no doubt of the correctness of these views."

In this case just cited, in which Justice Field approved the holding of the Pennsylvania supreme court, he went on to decide that a certain bond held by a nonresident was not taxable under a certain statute passed by the state of Pennsylvania; but his decision proceeded upon the grounds that a tax imposed in that way would impair the contract between the railroad company and the foreign holder. In so far as the Pennsylvania case of *Maltby* v. *Reading & Columbia R. Co.* is applicable to the question before this court in Mississippi, it has been approved by the supreme court; for in this case the property upon which the deed of trust was given is located in the state of Mississippi, hence the right of the state of Mississippi to tax.

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Brief for appellant.

All the property in the state of Mississippi, of whatever nature or kind, in whatever form or place, is subject to taxation, unless exempt by law. Ann. Code Miss., 1892, sec. 3744.

(2) The particular right of the state of Mississippi to tax this character of property of nonresident creditors by virtue of the statutes of Mississippi and the law as announced by the courts of last resort in that state and throughout the country.

As a matter of reason, or justice, and of policy, it is difficult to perceive why the state of Mississippi should not tax a foreign corporation for lending money, taking mortgages, and transacting the same character of business for which it does impose a tax upon citizens of that state and all domestic corporations. Why should a foreign corporation be allowed that advantage over a domestic corporation? Recurring again to that well-considered case, *Maltby* v. *Reading & Columbia R. Co.*, we wish to point out the fact that this was a suit in which a tax upon bonds issued by the defendant railroad company was imposed on nonresident holders, and the court sustained the tax as legal. "As to the nonresidence of the holder of the loan, it is undoubtedly true that the legislature of Pennsylvania cannot impose a personal tax upon the citizens of another state; but the constant practice is to tax property within our jurisdiction which belongs to nonresidents. . . . . There must be jurisdiction over either the person or the property of the owner, else the power cannot be exercised; but where the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, lives elsewhere. The duties of sovereign and subjects are reciprocal, and any person who is protected by government in his person or property may be compelled to pay for that protection." *Maltby* v. *Reading & Columbia R. Co.*, 52 Pa., 146; *Hood's Estate*, 21 Pa., 114; *West Chester School Dist.* v. *Darlington*, 38 Pa., 157.

In discussing the subject of nonresident creditors and their

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Brief for appellant.

liability to taxation, it will not be attempted to deny that certain courts have held that the situs of a debt is the domicile of its owner; but we believe that the court of appeals of New York was right, and should control this question, when it said: "The fiction or maxim, '*Mobilia sequuntur personam,*' is by no means of universal application. Like other fiction, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law.' So Judge Story, referring to the situs of goods and chattels, observes: 'The general doctrine is not controverted, and although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined.' He adds, quite pertinently, I think, to the present question: 'A nation within whose territory any personal property is actually situated has an entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' I can think of no more just and appropriate exercise of the sovereignty and jurisdiction of a state or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of the government and law." *Hoyt* v. *Com'rs of Taxes,* 23 N. Y., 224.

It would seem that, when Blackstone and Story are at one as to the situs of personal property and how it would be regarded, a court will not be far wrong which follows such distinguished leadership. So much for the oft-quoted and misused doctrine of the situs of personal property for the purpose of evading

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Brief for appellant.

taxation. The case from which the quotation above is taken decided that the personal property of a nonresident, which is situated in the state of New York, is liable to taxation. *Hoyt* v. *Com'rs of Taxes,* 23 N. Y., 224. Personal property may be taxed where it is permanently located. *Mills* v. *Thornton,* 26 Ill., 300, 79 Am. Dec., 377.

In the case of *Com.* v. *Gaines,* 80 Ky., 489, a tax levy was made upon barrels of whisky in a warehouse situated in Kentucky, which had been sold to a nonresident, but which remained in the warehouse. The court said: "Whether the whisky listed by the county court belonged to residents or nonresidents, its worth or value on the 10th of January, 1880, was subject to taxation under the equalization laws, and there is hardly any room for any sound argument on the proposition, as *'sic lex scripta est.'* The relative rights and equalities which may exist between the owner and the possessor of the whisky cannot affect the power of the state to authorize its assessment to either of them, as the legislature may deem most prudent and apt to result in securing taxes therefrom."

In the same line of thought a Michigan court held: "A mortgage of land so far partakes of the character of realty that it is competent for the legislature to provide that the mortgage of a nonresident mortgagee shall be taxed where the land is situated." *Common Council* v. *Board of Assessors,* 91 Mich., 78, 51 N. W., 787, 16 L. R. A., 59.

The state can tax all that is within its bounds, or which receives protection from its laws, unless exempt by the constitution of the United States or of the state itself. *Easton Bridge* v. *Northampton County,* 9 Pa., 418. The money of a foreign creditor, loaned to a citizen of this state, can be taxed at the residence of the debtor. *Pittsburg, Etc., R. Co.* v. *Com.,* 66 Pa., 73, 5 Am. Rep., 344. This case is based on the case of *Maltby* v. *Reading, Etc., R. Co., supra.* A tax upon bonds and mortgages and mortgages and contracts is properly assessed in

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Brief for appellant.

the town where the mortgagee resides. *Redfield* v. *Genesee County,* 1 Clarke Ch., 43.

In the case of *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462, the court, in discussing the right of the state of Oregon to tax a nonresident mortgagee, or, more properly, a mortgage held by a nonresident, said: "All subjects and things, as well as persons, over which the power of a state extends, may be taxed. 'The sovereignty of the state extends to everything which exists by its own authority or is introduced by its permission.' Marshall, C. J., in *McCulloch* v. *State,* 4 Wheat., 428, 4 L. Ed., 579. 'A mortgage, as such, is incorporeal property. It may be the subject of taxation; for the objects and sources of taxation are in general bounded only by the jurisdiction or territorial limits of the state, and extend to and embrace all privileges and rights, property, or franchises not exempted in the organic law.' Sneed, J., in *Harrison* v. *Willis,* 7 Heisk., 35, 19 Am. Rep., 604. 'Concede that the debt accompanies the respondent's person and is without the jurisdiction of the state. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds.' The question is wholly one of power, and since the power of the state over the mortgage is as exclusive and as complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is a constitutional limitation to the contrary."

It may or may not be urged before this court that this tax would impair the obligation of the contract. There can be no merit in any such argument, and we will discuss it only by referring to the very pertinent remark made by the case we have just been examining, *Mumford* v. *Sewall,* 11 Or., 69, 4 Pac., 585, 50 Am. Rep., 462: "If an act taxing mortgages impairs the obligation of the contract, it impairs such obligation in every case of mortgagee, irrespective of the residence of the parties to it." If a tax by the state of Mississippi would impair

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Brief for appellant.

the contract, similar taxes made within the state of Mississippi would impair the contract of every mortgage, trust deed, or other evidences of indebtedness which Mississippi has the undoubted right to tax. Resting absolutely upon the authority above stated in regard to the impairments of contracts, we will leave this part of the subject, as we consider the reasoning unanswerable.

Returning to the question of the right of the state to tax a nonresident creditor, in accumulating authorities, we will call the court's attention to and ask its consideration of *Buck* v. *Miller, Treasurer of Tippecanoe County,* 147 Ind., 589, 45 N. E., 647, 47 N. E., 8, 37 L. R. A., 384, 62 Am. St. Rep., 436. In that case the court said, in regard to this fiction of the situs of personal property: "The situs of such personal property for the purpose of taxation does not always or necessarily follow the domicile of the owner. . . . . If, therefore, the personal property is used in this state, it will be assessed here, even though the owner may reside elsewhere; and this must be true of credits and moneys, as well as other forms of personal property. . . . . If he lived here and did business in the state, having with him his money, stocks, bonds, notes, and mortgages as the capital and means of doing such business, then it would be immaterial whether he might claim citizenship in some other state or not. . . . . The law cannot thus be evaded. His property, so used in business and so held in the state, would be subject to taxation." *Buck* v. *Miller,* 147 Ind., 589, 45 N. E., 647, 37 L. R. A., 384, 62 Am. St. Rep., 436. See, also, *Colbert* v. *Leake County,* 60 Miss., 142.

In discussing the propriety and justice of the views stated in the above case, the same court, on a rehearing of the same case, made the following pertinent remark: "The property owner, to be sure, may have certain occasional twinges of conscience that he is sponging off the community, that he is receiving the benefit of the law for the protection of his property, that the

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Brief for appellant.

courts are open to him for the collection of his bonds and notes, and the foreclosure of his mortgages; in a word, that all his personal property and business interests are as carefully guarded as if he were a citizen of and domiciled in the state. But all these things are done for him at the expense of his neighbors, the citizens of the state, who pay their taxes regularly from year to year." *Buck* v. *Miller,* 147 Ind., 589, 47 N. E., 8, 37 L. R. A., 384, 62 Am. St. Rep., 436.

Again, the court said, in rather picturesque language, that he might always allege, as he had done now, "that he was a citizen of and domiciled in another state, then his personal property, subject to taxation, like the youth's gold under the rainbow, will always be a little further off, and so escape taxation altogether." *Buck* v. *Miller,* 147 Ind., 589, 47 N. E., 8, 37 L. R. A., 384, 62 Am. St. Rep., 436.

A Nebraska court, holding the same doctrine of taxing property where found, whether of a nonresident creditor, says: "The power of the legislature to separate, for the purpose of taxation, the situs of personal property, whether of a taxable nature or in the form of choses in action, from the domicile of the owner, is unquestioned, and if any such property in any form is within its jurisdiction it may tax it." *Finch* v. *York County,* 19 Neb., 52, 26 N. W., 589, 56 Am. Rep., 741. The Nebraska case cited in support of its doctrine *Griffith* v. *Carter,* 8 Kan., 565, and *Hoyt* v. *Com'rs,* 23 N. Y., 224.

An Illinois court said in regard to this matter: "If the owner be resident in the state, there is jurisdiction over his person and over his credits also, which in legal contemplation, in the absence of anything showing that they have a situs elsewhere, accompany him. If the owner is absent, but the credits are in fact here, in the hands of an agent for collection, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing." *Goldgart* v. *People,* 106 Ill., 25.

The only collection that is contemplated by law is the collec-

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tion which it can enforce, and the only mode of enforcing a collection of this debt is not only actually in the courts of the state of Mississippi, but also by an express stipulation in the trust deed itself it is so provided.

There is another view to take of this case, which it would seem would inferentially give the right of taxation to the state of Mississippi. If a nonresident creditor, owning mortgages and holding notes secured by deeds of trust and other evidences of indebtedness, should die at his foreign domicile, his estate in Mississippi would be administered by an ancillary administrator, appointed and residing in Mississippi; and according to the laws of that jurisdiction property in the hands of such administrator in Mississippi could undoubtedly be taxed, although belonging to the estate of a foreigner. Should the corporation owning such property go into the hands of a receiver, an ancillary receiver in the state of Mississippi would be appointed, and all property in such ancillary receiver's hands would be taxed by the state of Mississippi. Minor, Conflict of Laws, sec. 105; *Reynolds* v. *Stockton,* 140 U. S., 254, 257, 11 Sup. Ct., 773, 35 L. Ed., 464; *Rockwell* v. *Bradshaw,* 67 Conn., 9, 34 Atl., 758.

So far we have seen and established by the weight of authority from the highest courts in any jurisdictions, first, that the state can tax anything within its jurisdiction and property which it protects; secondly, that it can tax this character of property, although the owners thereof are nonresidents of the state. Now it is our purpose to show that the state of Mississippi has taxed this character of property, and has sustained by its own decisions its position.

Section 3757, Ann. Code Miss. 1892, provides as follows: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks or other securities for

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Brief for appellant.

money, or employed in any kind of trade or business, shall be taxable for the same in the county in which such person shall reside, or have his place of business, or be temporarily located at the time of the assessment," etc. The corporation lending money on the instrument in question was temporarily located, by and through its agents, where the loan was negotiated and the instrument executed. This is shown by the instrument itself. There must have been an agent resident here. A loan cannot negotiate and consummate itself. This instrument is signed, sealed, and executed in the state of Mississippi. The agent of the grantees must have been here at its delivery, at the time the money was turned over to the grantors, and under the preceding section can be and is taxed.

The supreme court of Mississippi, in *Bank of U. S.* v. *State of Mississippi,* 12 Smedes & M., 458, said: "The object of this law appears to have been to impose a tax upon all property and all money loaned in this state, with certain exceptions, without any express reference to the residence of the owner. The terms employed are general, and there seems to be no reason to presume a discrimination in favor of nonresidents. Those who have property in the state look to the government for its security, and for means to enforce contracts in regard to it. What the state thus protects and regulates, it has the right to tax. This power has its foundation in society itself. It is regulated by all for the benefit of all." This doctrine was sustained in another Mississippi case, viz.: *Coulson* v. *Harris,* 43 Miss., 728, and numerous cases cited therein.

As has been stated and reiterated, courts have sustained taxation upon notes, where the paper evidences of the indebtedness happened to be, regardless of the locality of the creditor's residence. *Redmond* v. *Com'rs,* 87 N. C., 122; *Wilcox* v. *Ellis,* 14 Kan., 588, 19 Am. Rep., 107; *Poppleton* v. *Yamhill County,* 8 Or., 337.

It may be urged that this property is liable to taxation at the

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Brief for appellant.

residence of the creditor. This is immaterial. Double taxation can only spring from the act of one municipality and sovereign power. An owner of property has no right to dictate to the state of Mississippi when, how, and where it shall tax property found in its jurisdiction or protected by its laws. It is a well-established doctrine that a state in which a foreign corporation does business may levy a tax on the capital stock, even though all of such stock is held by nonresidents. *Com.* v. *Gloucester Ferry Co.*, 98 Pa., 105. Thus, shares of stock in a corporation are usually taxable at the domicile of the owner, not of the corporation. *Bradley* v. *Bauder*, 36 Ohio St., 28, 38 Am. Rep., 547; *Nashville* v. *Thomas*, 5 Cold., 600; *Worth* v. *Ash County*, 90 N. C., 409. But the right of the state of the corporation's domicile also to levy a tax upon the same stock is admitted. *Tappan* v. *Bank*, 19 Wall., 490, 22 L. Ed., 189; *Faxton* v. *McCosh*, 12 Iowa, 527; *American Coal Co.* v. *Allegany Co.*, 59 Md., 185.

Another phase of the question of exemption from taxation of a foreign creditor or of a domestic is this: That all such exemptions must be affirmatively shown; otherwise, it will be assumed that the legislature intended they should be taxed. The legislative intent must be expressed in clear, unambiguous terms; and it is the province of this defendant to show that Mississippi has positively exempted this property from taxation. *Railroad Co.* v. *Thomas*, 65 Miss., 553, 5 South., 108; *Ice Co.* v. *City of Greenville*, 69 Miss., 86, 10 South., 574. And, further, the language of the statutes of taxation must be construed favorably to the state, and exemptions not clearly given or existing by necessary inference cannot be allowed. *State* v. *Simmons*, 70 Miss., 485, 12 South., 477.

(3) The right of the state of Mississippi to levy a tax in this particular instance.

This right is based on secs. 3744 and 3757, which have been quoted. Code Miss., 1880, sec. 497, was almost identically the

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Brief for appellant.

same in language as sec. 3757 of the Annotated Code of 1892. In construing that section — *i. e.,* 497 of the code of 1880 — the supreme court of the state of Mississippi, in the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, construes the words to mean that money loaned or employed in the state of Mississippi, where the person resides or has his place of business or location, or any agent in the state, is taxable. This was a case in which the supervisors of Madison county placed upon the assessment roll certain loans of the American Freehold Mortgage Company, Limited, the Dundee Mortgage Company, Limited, and several other companies, who are nonresident corporations. The facts showed that the borrowers of these sums had applied to one Powell, an attorney at law in Madison county, for money, and that he acted as the agent of the borrowers and as their broker, for a commission paid by them, and secured loans for the companies above named; but Judge Campbell, speaking for the court, said: "There can be no doubt that where an agency is created in this state for the loaning of money, and the business of loaning money is carried on here, this state being the locality in which the transaction is begun and completed, and the debt acquires a situs here, from the course of dealings between the lenders and the borrowers, through the agency here, it is taxable money sent here from abroad to be loaned, and is undoubtedly subject to taxation."

There can be no doubt of what he meant, and upon this case we might almost rely. The facts in this case now before the court undoubtedly show where the loan was made. The trust deed in the record is a printed instrument. The words describing the location of the property in the state of Mississippi are printed therein. It contains the following clause: "The contract embodied in this conveyance and the notes secured hereby shall be construed according to the laws of the state of Mississippi, where the same is made." If the contract was made in Mississippi, it must have been made by an agent of the com-

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Brief for appellant.

pany, and that agent of the company must have had in his possession money sent him from abroad to be loaned, and according to the authority of *State* v. *Smith, supra,* it is undoubtedly subject to taxation. The court in the case also said: "This state being the locality in which the transaction is begun and completed, the debt acquires a situs here, in the course of dealings between the lender and the borrower, through the agency established here, and is taxable." *State* v. *Smith, supra.* The transaction must have been begun where the money was wanted, and must have been completed when the money was paid; and a solemnly attested and executed deed of trust shows that the transaction was consummated by an agent, who subjected the money and the instrument and the interest in the property secured thereby to the jurisdiction of the state of Mississippi.

(4) The clause contained in the written contract, conveying certain property in the state of Mississippi in trust to David Horton, for the use of the Colonial & United States Mortgage Company, Limited, in words following, to wit: "The contract embodied in this conveyance, and the notes secured thereby, shall be construed according to the laws of the state of Mississippi, wherein the same is made"— localizes and domesticates the debt therein secured, and subjects the same to taxation in this state. In determining the obligation of a contract, the maxim, "*Modus et conventio legem vincunt,*" emphatically applies. Minor's Conflict of Laws, sec. 181, p. 441; *Warren* v. *Lynch,* 5 Johns., 239; *Strawbridge* v. *Robinson,* 5 Gilman, 470, 50 Am. Dec., 420. If the parties to the contract desire their obligations to be such as the laws of a particular state would prescribe (whether their own or a foreign state), they may effect this result in several ways. They may express in their contract all the stipulations which would be implied by the laws to which they have reference, and such express stipulations will prevail over the mere implication of any system of law.

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Brief for appellant.

"*Modus et conventio legem vincunt.*" Or they may accomplish the same result merely by declaring their intention to obligate themselves in accordance with some particular law. The provisions of that law then become as much the same express stipulation of the contract as in the former case. If we go a step further, and suppose that the parties have made no express stipulation at all in their contract as to what laws shall control the obligation incurred by them in respect to matters on which the contract itself is silent, but that the contemporaneous declarations and all the surrounding circumstances show that they actually had the law of a particular state in mind when they entered into the contract, it is equally clear that here, also the intention of the parties must fix the law which is to determine the obligations incurred by them. Minor's Conflict of Laws, sec. 181, pp. 141, 142; *Jacobs* v. *Credit Lyonnais*, 12 Q. B. Div., 589, 596.

The clause above referred to localizes and domesticates executory contracts. *Stevens* v. *Gregg*, 89 Ky., 461, 12 S. W., 775; *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y., 367, 38 Am. Rep., 518; *Baum* v. *Birchall*, 150 Pa., 164, 24 Atl., 620, 30 Am. St. Rep., 797; *Robinson* v. *Queen*, 87 Tenn., 445, 11 S. W., 38, 3 L. R. A., 214, 10 Am. St. Rep., 690; *Odell* v. *Gray*, 15 Mo., 337, 55 Am. Dec., 147; *Peck* v. *Mayo*, 14 Vt., 33, 39 Am. Dec., 205; *Mason* v. *Dousay*, 35 Ill., 424, 85 Am. Dec., 368; *Shoe & Leather Bank* v. *Wood*, 142 Mass., 563, 8 N. E., 753; *Grunwald* v. *Freeze* (Cal.), 34 Pac., 73; *Price* v. *Indseth*, 106 U. S., 546; *Sturdivant* v. *Bank*, 60 Fed., 730, 9 C. C. A., 256.

Having shown by the above cases that the contract was localized, and subject to all the laws of the state of Mississippi, it necessarily follows that it was subjected to the laws concerning taxation by the clause heretofore referred to. The clause heretofore referred to located the situs of the debt according to the intention of the contracting parties. The reasoning is sus-

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tained in *Stevens* v. *Gregg* and the cases following, heretofore cited.

We now confidently submit the proposition that the case of *State of Mississippi* v. *Smith, supra,* cannot and will not influence this court in arriving at a decision adverse to the appellant, for the manifest reason that the facts with which the court had to deal in that case are not such as we present for the consideration of the court on this appeal. In this connection, I refer especially to the stipulation in the contract or deed of trust, by which the debt sought to be taxed here is secured, and to which I have called the court's attention in this paragraph of my brief. On the contrary, we insist that said debt, by reason of said contract and agreement, acquired a situs here, from the course of dealings between the lender and the borrower, because of the fact that the said contract or transaction out of which the same arises, was "begun and completed" in this state, and the parties to said contract will not be permitted to dispute or deny this fact, after having admitted it to be a fact in the most solemn manner known to the law; and as the transaction was thus begun and completed in this state, unquestionably the debt thus created is as much liable to taxation as though the whole transaction had taken place or arisen between resident citizens of this state.

If, however, we are mistaken in the view, we then respectfully say that in arriving at a decision in the case of *State* v. *Smith, supra,* the court in some unaccountable way fell into error, and by adhering to the strict letter of fiction, "*Mobilia sequuntur personam,*" the court would kill the spirit of the contract entered into between the parties above mentioned. The fiction in that case, as in this, should be forced to yield to the rule of facts, and the truth and honesty of the transaction in question, and should not be resorted to by the court, because it is not required by justice, and because the circumstances and the truth of the case should now be adopted as the true rule, and

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Brief for appellant.

the fiction above mentioned should be discarded. We therefore submit that, if the *Smith Case* stands in the way of a reversal here, it should be overruled. It will be noted in the *Smith Case* that Justice Campbell quotes with approval the opinion of this court in *Jahier* v. *Rascoe,* 62 Miss., 699, where it was said "that whether personal property is situated in this state or not is to be determined by referring to the intent of the owner, which intent is to be discovered by all the surrounding circumstances." It is shown clearly in the case at bar that it was the intent of the owner of the money loaned, as well as the borrower, that the property should be and was dealt with as though it was situated in this state; and to emphasize this intention on the part of the contracting parties they expressly stipulated that the contract should in all respects be construed according to the laws of this state, and to further emphasize the proposition for which we contend, said parties likewise expressly stipulated and agreed that the said contract shall not only be construed according to the laws of the state, but with equal positiveness they assert in their agreement that the transaction from which it arose was made in the state of Mississippi, and I cannot conceive how it is possible for the appellee to now escape the force and effect of the written contract and admission thus solemnly made by it.

By further reference to the deed of trust securing the debt which we seek to tax, it will be found that the appellee evidently apprehended that the evidence of the debt secured by that instrument would in all probability be taxed in order to protect itself, and it exacted of the borrower a further agreement in the face of said deed of trust that, should the indebtedness thereby secured be subjected to taxation, the borrower should be liable to the lender or its assigns for the amount thereof, provided that the sum, when added to the interest agreed upon, should not exceed the rate of 10 per cent per annum. It is fair to assume, perhaps, that the appellee, when making the stipulation to the

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Brief for appellant.

effect that the contract should be construed according to the laws of the state of Mississippi, etc., had the usury laws of other states in view, and intended, by exacting this agreement of the borrower, to take advantage of the liberal interest laws of this state. They will not, however, be thus permitted to say that their contract is to be controlled in this regard by the laws of the state of Mississippi, and at the same time and in the same breath to say that the said contract shall not, for the purpose of taxation, be controlled by the laws with reference to the latter subject.

Recurring to that stipulation, in that deed of trust above mentioned, wherein and whereby the borrower is required by the lender to pay taxes on the indebtedness therein described and secured, the court will observe that the parties to that contract had in view current, and not back, taxes; and, moreover, by a fair and reasonable construction of the contract, it will be held to embrace taxes on the land described in the said deed of trust, and not an obligation upon the part of the borrower to pay any taxes that the lender may be subjected to as the owner of the indebtedness described therein. This is clearly manifested by the insertion of the subsequent clause, wherein it is provided that the contract then made between the parties should in all respects be construed according to the law of the state of Mississippi, where the same was made; for, had the appellee at that time contemplated that it was liable for taxes, as we now claim it is, this latter clause would never have been embodied in the contract referred to.

If, however, we are incorrect in this assumption and contention, we insist that the contract in this particular is contrary to public policy, and cannot be enforced by any proceeding in the courts of this state. "Any provisions in a mortgage, giving the mortgagee advantages not properly belonging to the contract of mortgage, will be held inoperative as against public policy." 15 Am. & Eng. Enc. of Law, p. 2; Story, Equity

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Brief for appellant.

Jurisprudence, sec. 1019. The supreme court of New Jersey, in a very well considered opinion, in which numerous authorities are collated and discussed, say in part: "Whatever tends to injustice or oppression, restraining liberty, etc., when embodied or made the subject of a contract, makes the contract against public policy, and therefore void, and not susceptible of enforcement." *Brooks* v. *Cooper,* 26 Atl., 978, 21 L. R. A., 617, 35 Am. St. Rep., pp. 793-799.

(5) Appellee is liable for and in any event will be required to pay to the board of levee commissioners for the Yazoo-Mississippi Delta the amount claimed to be due said board.

The whole scheme of legislation, from the time the board of levee commissioners for the Yazoo-Mississippi Delta, above mentioned, was created, during the year 1884 (Laws 1884, p. 140, c. 168), up to and including this date, indicates beyond all question that the object and purpose of the lawmaking power in thus creating said levee board, and investing it, not only with power to collect taxes, but the fact that the taxes thus to be collected were in express terms levied and assessed by the legislature on all property of individuals or corporations, of whatsoever character or description, which was either directly or indirectly protected or to be protected by the maintenance of a line of levees along the Mississippi river front in said district, was to require them to bear their just proportion of the burdens incident to the construction and subsequent maintenance of said levees; and in furtherance of this purpose and intent the legislature of 1884, in the act which created said board, expressly levied and assessed an *ad valorem* tax against the property of individuals of 13 mills on the dollar upon the assessed value of all real estate and personal property in the front counties of Tunica, Coahoma, and a part of De Soto, and a similar tax of 9 mills upon all such property in the remaining or back counties, as will be seen by reference to section 13 of said act (*Id.* p. 151, c. 168). And by section 14 of said act a similar

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Brief for appellant.

ad valorem tax was levied upon all the property of railroad companies and other corporations in the following language: "Said *ad valorem* tax of 13 mills or 9 mills on the dollar, according to the location, is hereby levied and assessed upon all the property of such railroad companies or other corporations, and the tax collectors of all the counties wherein the same may be situated shall collect said taxes and pay the same over to the treasurer of the levee board." Acts 1884, p. 140, *et seq.;* Const., sec. 237.

It will be noted that, when the legislature in said act dealt with or had reference to the property owned by individuals, it expressly provided in section 13 that the tax therein levied and assessed should only affect or cover the property owned by such individuals, real and personal, in the front counties; but when they came to deal with railroad companies and other corporations they emphatically levied and assessed the tax provided for in section 14 upon all property owned by said corporations, regardless of whether the same be situated in or out of the state of Mississippi. The language used in thus levying and assessing said tax is too clear and unambiguous to call for any refinement, or even construction, unless, perhaps, it may be said that the legislature in thus acting transcended its authority in its effort to thus impose taxes upon corporations, and was, therefore, *ultra vires.* To this I think the answer is that it appears from the whole act that the legislature intended that every character and species of property should be subject to the payment of taxes thereby levied, and that by the use of the language, "all the property of such corporations," the legislature unmistakably intended to tax all property owned by such corporations upon which they had the legal right to levy and impose a tax, and I cannot anticipate that the counsel for appellee will seriously contend that the legislature was not authorized to so levy and impose the tax upon such property as we seek to hold liable in this proceeding.

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Brief for appellant.

It may also be insisted that the language used in the first part of said section 14 of the above-mentioned act limits the tax to such property of such corporations as is situated within the limits of said levee district. It is true that at first glance it would appear that such was the case; but, when carefully considered and properly construed, we insist that the legislature, in the first part of section 14, merely intended to take away from the corporations therein enumerated any exemptions or donations of taxes, whether by charter or under special law. It cannot be said that the taxes provided for, levied, and assessed in said section were limited in any language therein used to property which was situated in the levee district. Had that been the intention, the language used would have so limited the levy and assessment of those taxes. That the property that we seek to hold liable for taxation in this case is protected by the construction and maintenance of the levee system above mentioned will not be disputed. In truth and in fact, but for the protection afforded by the levees, the land upon which the appellee holds security would inevitably be subjected to annual inundation, its value destroyed, and the security rendered worthless. It is, therefore, but right and proper, as these people derive all these benefits afforded them by the levees, that they, whether resident or nonresident, should bear their part of the burden.

We earnestly insist, contend, and reiterate that no property was exempt or is exempt from the taxes levied, assessed, and above referred to; and we again call the court's special attention to the fact that, where an exemption from taxation is claimed, it becomes the duty of the party so claiming the same to point out under what law they claim the exemption, and it is likewise their imperative duty to bring themselves by competent and irrefutable proof clearly within the exemption, and this appellee has not done and cannot do so in this instance. Equity, justice, honesty, and fair dealing as with one voice cry

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Brief for appellant.

out simultaneously that this appellee should be compelled to contribute to the support and maintenance of the system of levees by which it, equally with individuals residing in the levee district, is protected. As above stated, remove the levees, and the securities held by these people in enormous amounts and for collossal sums would at once become valueless, while with the levees intact they are considered, throughout the length and breadth of the land, as gilt-edged paper. In support of the doctrine above announced, namely, the right of legislature to tax that species of property which we seek to reach in this proceeding, I desire to call the court's attention to the following authorities: *Cole* v. *Town of Errol,* 116 U. S., 517; 25 A. & E. Enc. Law (1st Ed.), p. 134, note 3; *Allen* v. *Leonard,* 16 Gray, 202; *Mumford* v. *Sewall* (Or.), 4 Pac. 585, 50 Am. Rep., 462; *State* v. *Branin,* 23 N. J. Law, 484, cited in note 56 Am. Dec., 524; *Battle* v. *Mobile,* 44 Am. Dec., 438.

It appears from the record that the property sought to be reached for the purposes of taxation in this proceeding has been assessed by the board of supervisors of Coahoma county on the personal assessment rolls as property owned by appellant in the state of Mississippi. This action on the part of legally constituted authorities created a debt under the laws of our state against the appellee, in favor of the state, Coahoma county, and the levee board, for taxes due on the said property for the years mentioned in the pleadings. We insist, furthermore, that the action of the board of supervisors in thus assessing said property for taxes is the nature of a judgment against the appellee for the debt thereby created, and, as the appellee did not see fit to test this proceeding upon the part of the board of supervisors by prosecuting an appeal, as they had the legal right to do, they are now precluded from denying that they owe the amount of this debt as claimed by the appellant. Moreover, we say that after this property was assessed for taxes a lien immediately arose against the property therefor, and thereafter,

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Brief for appellant.

when the attachment for this debt was sued out by the appellant, and garnishments served upon the parties residing within the state who were indebted to the appellee, the fiction, *"Mobilia sequuntur personam,"* must inevitably yield to the true facts. In other words, we say that this appellee owes the debt for taxes for the recovery of which this suit is instituted, and the situs of that debt, as well as the property assessed, is in the state of Mississippi, and should and must be made to respond to the demands of the state, county, and levee board, even though we admit for the sake of argument that as an ordinary rule the situs of the debt follows the person of the owner. Under the peculiar circumstances of this case, to wit, our laws creating the lien and making the taxes assessed by the proper authorities a debt against the person on whom the assessment is made, by having the assessment approved and proceeding to collect this debt by attachment and garnishment, we have clearly and unmistakably brought the property sought to be taxed within the jurisdiction of the court, and the situs of the property so assessed is located in the state of Mississippi by the action of the board of supervisors, *supra,* and by reason of the failure of appellee to avail itself of its right under the law to prosecute an appeal from the action of the board of supervisors in so assessing it with taxes on its said property.

Again, referring to the cases cited in my supplemental brief, and more particularly to the case of *Blackstone* v. *Miller,* I want to say to the court that, notwithstanding the fact that the opinion of the court in the latter case hinged upon the construction of a statute of the state of New York opposing taxes upon the transfer of property in that state, yet in our opinion no distinction can be drawn between the statute imposing such tax and the general statute of this state imposing taxes upon all property not expressly exempted from the operation thereof. If, however, I am mistaken in this contention, I still insist that the *Blackstone-Miller Case* is absolutely and positively

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Brief for appellant.

decisive of the case at bar, for the reason that the property referred to in that case is in all respects identical with the property with which we have to deal here; and, as the supreme court held distinctly that the debt or debts due by citizens of New York to nonresident citizens of Illinois constituted property in the state of New York, and therefore subject to taxation under its laws, so we say that the debts of solvent credits due by citizens of Mississippi to nonresident appellee likewise constitute property, and, for the reasons given by Justice Holmes in the case *supra,* it is for the purposes of taxation located and domesticated in the state of Mississippi, and, not being expressly exempt, is liable and has been subjected to taxation. It is conceded by the appellee that, if the solvent credits with which they were assessed could be considered or held to be in the state of Mississippi, then the appellee must fail and the reversal of this case follow. This being true, at the risk of being considered tedious and tautologous, I again say that the cases referred to in my supplemental brief are unanswerable on this proposition; for in each of those cases the courts held that a chose in action, although owned by a nonresident descendant at the time of his death, was not only property, but was property within the state of New York, where the debtor resided, and where the creditor, under the law, was required to go in order to enforce the payment of the debt due.

Tim E. Cooper, for appellant.

The appellee is a nonresident mortgage company, engaged in the business of lending money in this state. The notes given by the borrowers usually mature in a series of years and are secured by mortgages upon lands situated in this state. The mortgages are printed, and contain a stipulation that the contract of loaning shall be governed by the laws of the state of Mississippi. The question for decision is whether the debt and security are taxable under existing laws in the state.

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Brief for appellant.

There are four questions involved in the decision of these appeals. These questions are: First, Is it competent for the state to impose taxes upon the property sought to be taxed? Second, Has the state imposed such taxes, directly or by implication? Third, Is the legislative scheme for taxing such property sufficient for the imposition and collection of these taxes? Fourth, Are these proceedings within that scheme?

We concede that we must secure an affirmative answer to each question to entitle appellant to succeed. If, however, we can show that the state has power to impose the tax, that it has imposed it, that the machinery and proceedings provided by statute are sufficient for the imposition and collection of the tax, and that we are proceeding within that scheme, the appellant is entitled to a reversal of the decrees from which these appeals are taken. That the state may tax property of this character we suppose will not be denied by the appellees. The decisions of the state and federal courts are practically uniform in declaring the right of the state to tax. We shall cite and quote from these decisions, not only to show the existence of the power to tax, but also to show the principles upon which the power rests, because these principles will be found important in the consideration of the other questions involved. We concede, of course, that mortgages under our statutes do not possess all the attributes of mortgages at common law. The estate of the mortgagee does not become absolute on breach of the condition. Until breach the mortgagor remains owner, at law as in equity, and upon breach the mortgagee is entitled to the legal estate only so far as to enable him to enforce the security for the collection of the debt secured.

In *Savings & Loan Society* v. *Multnomah Co.*, 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, it was expressly held that the power of the state to tax existed, and also that it was immaterial that under the laws of the state the right which the mortgagee had in the land was not the legal estate, but only an

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Brief for appellant.

equitable interest by way of security for his debt. In that case the court quotes with approval the language of Judge Waldo in delivering the opinion in *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462, as follows: "All subjects, things as well as persons, over which the power of the state extends, may be taxed. A mortgage, as such, is incorporeal property. It may be the subject of taxation. Concede that the debt accompanies the respondent's person, and is without the jurisdiction of the state. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds. . . . Since the power of the state over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the state, unless there is constitutional limitation to the contrary." The court also quotes from the decision of Judge Deady in *Dundee Mortgage Company* v. *School District,* 10 Sawy., 52, as follows: "In *Mumford* v. *Sewall* the court held that a mortgage upon real property in this state is taxable by the state, without reference to the domicile of the owner or the situs of the note or debt secured thereby. And this conclusion is accepted by this court as the law of the case, nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage upon real property in this state, whether evidenced as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt, and the power to enforce the payment thereof by sale of the premises, is a contract affecting real property in the state, and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the state for the time being, for the purpose of avoiding taxation therefor, or otherwise, is immaterial." In *Savings & Loan Society* v. *Multnomah Coun-*

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Brief for appellant.

ty, the court further said: "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of congress in the distribution of the debtor's estate. *United States v. Hooe,* 3 Cranch, 73, 2 L. Ed., 370; *Thompson* v. *Smith,* 2 Wheat., 396; *Conrad* v. *Insurance Co.,* 1 Pet., 386, 7 L. Ed., 189." In *Hutchins* v. *King,* 1 Wall., 53, 17 L. Ed., 544, Mr. Justice Field, delivering the opinion of the court, said that "the interest of the mortgagee is now generally treated by the courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security. *Waterman* v. *McKinsey.* If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation." That the taxes may be imposed see, also, *Maltby* v. *R. R. Co.,* 52 Pa., 140; *Poppleton* v. *Yamhill County,* 18 Or., 377, 23 Pac., 253, 7 L. R. A., 449; *Allen* v. *National Bank* (Md.), 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep. 517; *Faust* v. *Germain Bldg. Ass'n,* 84 Md., 186, 35 Atl., 890.

It being thus shown that the state has the power to impose the tax, the next question is whether it has been imposed. In determining this question we must look to the legislation of the state. But by legislation is not meant the action of the legislature, composed of the senate and the house of representatives. We look both to the legislation by that body and legislation in the organic law. Provisions declared by either are equally laws, and equally binding, save in cases of conflict the constitution controls. Now, if we have shown in what has heretofore been said that the security received by the appellees is property localized and situated in this state, it falls within that provision of our constitution which declares that "taxation shall be uniform and equal throughout the state. Property shall be

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Brief for appellant.

taxed according to its value. . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." This provision, like all others of the constitution, is mandatory upon the legislative and other departments of government. *Sutherland Contr.*, sec. 79; *Ex parte Wren*, 63 Miss., 512, 56 Am. Rep., 825; *Yazoo & Miss. Valley R. R. Co.* v. *Adams*, 77 Miss., 194, 24 South., 200, 317, 28 South., 956; *Brien* v. *Williamson*, 7 How., 14. In the case of *Brien* v. *Williamson*, the opinion of Chief Justice Sharkey contains a vigorous and succinct presentation of the rule for which we contend. The court will read this case with pleasure, from the first to the last syllable of the opinion. Among other things, Judge Sharkey said: "The words 'shall be,' when used by a lawmaking power, are words of enactment. They declare the law. In legislative acts this undoubtedly would be their proper meaning. When used in the constitution they have the same meaning, unless they be qualified by other words indicating the scope of their meaning." Again Judge Sharkey says that a constitution "is but the frame and shell of a government, containing the general outline, leaving the detail to be filled up in subordination and auxiliary to the essential and fundamental principles thereby established. But it is not on that account the less binding. It is from its very nature and object the supreme law of the land, fixed and unalterable, except by the power that made it. It contains only certain great principles, which are to control in all legislation and extend through the whole body politic. These principles are of themselves laws. Constitutions do not usually profess to insure obedience by prescribing penalties. They merely declare the rule or establish the principle, which, being paramount, makes void whatever is repugnant to it."

Recurring, now, to the constitutional provision which we have quoted, we find a clear declaration that all property within the state shall be taxed, that it shall be uniformly taxed,

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and that it shall be taxed according to valuation. We do not contend, of course, that in furtherance of matters of public policy there may not be an exemption from taxation, where its equivalent is supposed by the legislature to be received in another form from the enterprises intended to be fostered in the interest of the public. These exemptions, however, must be uniform in their operation, and such that any member of the body politic, bringing himself within the class, may secure the benefit intended to be conferred. That would be a mere arbitrary exercise of legislative power, and violative of the constitutional provisions, which would declare that all owners of money or choses in action should hold property exempt from taxation. This has been distinctly ruled by this court, and it follows, also, as a necessary corollary from the decision in *Railroad Co. v. Adams*, 77 Miss., 194, 24 South., 200, 317, 28 South., 956. We are not contending that all property in the state must be taxed, but only that, when property of a class is taxed in the hands of one citizen, all property of the same nature, in the hands of others and subject to taxation, must also be taxed.

Assuming, for a moment, that the situs of a debt was at the domicile of the debtor, our proposition is that it would not be competent for the legislature of the state, taxing the property of its citizens to exempt from taxation property of a nonresident of precisely the same class. The rule of law that the situs of a debt is at the domicile of the creditor is a mere fiction, invented by the courts for the purpose of controlling in some degree an intangible right. It is not a rule of private international law at all, and is subject to legislative control. In truth, without legislation, the rule itself is not of uniform operation, and the opposite is sometimes asserted by the courts, and the situs of debt fixed at the domicile of the debtor. The process of attachment by garnishment rests upon the theory that, wherever the debtor may be found, there the property is, and the

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Brief for appellant.

court secures jurisdiction over the thing by summoning as a garnishee he who is indebted. Rood on Garnishment, secs. 237-242. The court will observe that in the case under consideration the creditors have done all they could to locate the debt in the state of Mississippi. It is expressly provided that the contract shall be construed under the laws of this state. We find the situs, therefore, of the debt sought to be taxed, localized by the conjoint action of the creditor and the debtor, and by nature of the security itself.

In *Allen* v. *Bank,* 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517, the state of Maryland levied a tax of 8 per centum upon the amount of interest annually reserved on all mortgages. There was nothing in the act, so far as appears by the report, discriminating in favor of or against the holders of the mortgage, because of the fact that they were resident or nonresident. There was nothing to indicate a purpose to tax nonresident mortgagees, except the general language of the statute, that "all mortgagees or assignees holding mortgages of record in this state shall annually pay a tax of eight per centum upon the gross amount of interest covenanted to be paid," etc. The supreme court of Maryland held that mortgages owned by nonresidents upon real estate in the state of Maryland were taxable under that statute.

It is no reply to say that to tax the mortgage and the land would be double taxation. In the above noted case the supreme court of Maryland said: "Again, the fact that our statute makes no provision for deducting the mortgage debt from any assessment upon the mortgagor is rather an objection to its justness and fairness, than to its validity. Statutes taxing the land to the mortgagor, and the mortgage debt to the mortgagee, have been frequently declared valid in Maryland and other states." It is not, however, true that the interest of the mortgagee in the land is in any sense covered by an assessment of the land to the owner. The mortgage attaches to and gives

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character to the debt which it secures. It localizes it in the state in which the lands are situated. The courts of the domicile of the owner can afford no sort of relief in the enforcement of the security afforded by the mortgage. It is property simply because it is recognized by the laws of this state, and to the extent only of that recognition. The creditor must rely upon the laws of the state in which the mortgaged property is situated for the security and for its enforcement. It is but just that such creditor should contribute to the support of that government which alone can recognize, maintain, and enforce his rights. As was said by Judge Field in *Hutchins* v. *King,* 1 Wall., 53, 17 L. Ed., 544: "If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation." In *State* v. *Smith,* 68 Miss., 79, 8 South., 294, the attention of the court was directed primarily to the question as to whether the money loaned was taxable under section 497 of the Code of 1880, and it was held that it was not, because the person through whom the money was loaned was not the agent of the lender, and that the statute under consideration only applied where the money was loaned through a resident agent. Neither in the brief of counsel nor in the opinion of the court is there a discussion of the question now presented, nor had the case of *Yazoo & Mississippi Valley R. R. Co.* v. *Adams* then been decided by this court. We understand that decision to affirm, not only that all property in the state must remain subject to taxation, but that it must be subjected to taxation, unless exempted under some general scheme, for the purpose of state policy, in which exemptions all may participate who bring themselves within the class, and, of course, the exemption must not be an arbitrary one, giving protection to one of the class and not to another.

Our proposition is that, if the interest of the appellees here is taxable under our laws, it is because that interest is subject

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to the taxing power of the state, and if it is subject to the taxing power of the state, it is because it is property situated in the state, and, being so situated, falls within the control of our constitution. In other words, if the legislature might tax the property, it must tax it, unless lawfully exempt under some scheme which it was competent for the legislature to enact, and that it is not competent for the legislature to tax property of a particular class for its own citizens, and exempt property of the same class held by nonresidents upon the ground only that it was so held. The fundamental and primary inquiry is whether the property sought to be taxed here is property in the state of Mississippi, and that it is such property is recognized in the authorities we have hitherto cited.

Proceeding to the next proposition, it may be thus stated: That all property which may be subjected to taxation must be subjected, unless under some constitutional scheme it is exempt, and that any scheme which taxed property so situated and owned by one class of people, and relieved from taxation the same sort of property owned by another class, would be unconstitutional and void. Looking to the constitution and the legislation of this state, we find that property of the class here involved has been taxed. If appellees are not to be taxed, it must be, and can only be, for the reason that somewhere in some law a constitutional exemption has been declared, or for some reason that the legislative scheme is not broad enough to include the assessment and collection of the tax sought to be recovered in this proceeding.

This brings us to the third inquiry, which is whether the legislative scheme for the taxing of property is sufficient for the imposition and collection of these taxes, and, subordinate to this, to the fourth inquiry, which may be considered with the third, as to whether the present proceedings are within that legislative scheme.

As we have heretofore said, some provisions of the constitu-

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Brief for appellant.

tion are self-executing, and need no aid from legislative provisions. Others are dependent for their activity upon the machinery to be provided by legislative action. If, however, the constitution is the supreme law, and of its own force nullifies contradictory legislation, it must follow that it does not depend upon the will of the legislature to exclude from operation constitutional provisions, where efficient machinery is provided under which they may act. To illustrate: There can be no taxation under our constitution, except by assessment and valuation, and assessment and valuation is not regulated and provided for by the constitution. The machinery for assessment and valuation must first be provided by legislative action, and when so provided, the constitution takes possession, and through the machinery provided by the legislature comes into action. If no scheme for assessment and valuation was provided by the legislature, there could be no *ad valorem* tax, because assessment and valuation is essential; but when a scheme for assessment and valuation is once provided by law, and remains in force, it is not competent for the legislature, in opposition to the organic law, to provide that some of the property liable to taxation shall not be subjected to taxation through such machinery. The case of *Yazoo & Mississippi Valley Railroad Co.* v. *Adams* illustrates the rule for which we contend. Of course, that railroad could not have been taxed unless there had been legislation by which the taxes could be assessed and collected. There was such machinery provided by legislation, and the legislature then intended to provide that, notwithstanding the existence of this machinery, the property of the railroad company should not, by its use, be subjected to taxation. This court, being of opinion that the exemption provided for was violative of the constitution, permitted the state to avail of the machinery to impose and collect the tax, although the legislative purpose was that it should not be brought into action as against the railroad corporation.

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Brief for appellee.

We do not understand counsel for the appellees to contend that the machinery afforded by our revenue laws is not amply sufficient and fit to bring the property of the appellees within the power of the tax collector. If we are correct in what we have said, it follows (1) that the appellees are the owners of property within the state, and subject to its taxing power; (2) that the constitution of the state intends that all property so situated shall be taxed; (3) that the legislative scheme for taxing the property of the appellees is sufficient for the imposition of the taxes; and (4) that these proceedings are within this scheme. Wherefore it is respectfully submitted that the decree of the court below should be reversed, and the taxes sought to be imposed collected.

Mayes & Harris, for appellee.

These two cases, by agreement of counsel and consent of the court, are heard together. They involve exactly the same fundamental question, which is the liability of foreign-held mortgages for taxation in this state; the only difference between them being that the first case was brought by attachment in the circuit court of Coahoma county on assessment of the same as "solvent credits," and was tried before the court on an agreed state of facts, while the second case was brought by a bill in chancery in Copiah county on assessment made on the mortgagee's interest in certain lands, and was decided by the chancellor on a demurrer to the bill. The questions raised are intimately connected, therefore. The bill in chancery proceeds on the idea that the interest of a mortgagee is such an interest in the lands themselves as renders it liable to taxation, while the question in the attachment case in Coahoma county is whether, as "solvent credits," the mortgages have a "business situs" in that county. The statutes on which the claim of the state revenue agent must necessarily be placed are the general laws for the taxation of lands in the one case, and in the other section

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Brief for appellee.

3757 of the Code of 1892, which, so far as it is material, runs as follows: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county in which persons may reside, or have a place of business, or be temporarily located at the time of assessment," etc.

This statute has been in force in Mississippi since 1857, literally, with the insignificant modification which we shall point out. It appears first as article 23 on page 76 of the Code of 1857, and it was in that code a development and modification of Act Feb. 24, 1844, for which see Hutchinson's Code, p. 182. In the Code of 1857 it was put into exactly the form in which it now appears, except that it did not contain the words, "or employed in any kind of trade or business." The statute was brought forward into the Code of 1871 exactly as it appeared in the Code of 1857; and it was brought forward again in the Code of 1880, as section 497, exactly as it appeared in the previous codes, except that the words mentioned above (i. e., "or employed in any kind of trade or business") were inserted; and again it was brought forward into the Code of 1892 as section 3757, exactly as it appeared in 1880. Now the questions presented by these two suits are not open questions in this state. They were fully and exactly presented as they are now, and presented by the same counsel, Mr. Miller, in behalf of the state, so far back as the year 1890. The case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, decided at the October term, 1890, and under the Code of 1880, presents the exact underlying question; and the statement of the case and the opinion of the court show that the facts involved were precisely the same in all their details. This court there adjudged that money loaned by nonresidents, although secured by mortgages

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Brief for appellee.

located in this state, was not liable to taxation in this state under the conditions set forth. The decision of the case (*State* v. *Smith*) was rendered, as shown above, at the October term, 1890; and when the Code of 1892 was adopted, section 497 of the Code of 1880, with the interpretation placed upon it by this court, was re-enacted without the change of a word or a letter. And it is well settled by repeated adjudications of this court that where a statute has been construed by this court, and on a new codification of the laws it is re-enacted without material change, the construction theretofore placed on it will be controlling, even although as an original proposition the court might be inclined to hold otherwise. *Davis* v. *Holberg,* 59 Miss., 362; *Shotwell* v. *Covington,* 69 Miss., 735, 12 South., 260; *Wetherbee* v. *Roots,* 72 Miss., 355, 16 South., 902. It is to be observed that when the Code of 1892 was adopted, not only had the court construed the act now again brought into question, and held that mortgage companies were not liable to pay taxes under it, but also the decision quoted above of *Davis* v. *Holberg,* had been made by this court since the year 1882. So that the codifiers and the legislature were both thoroughly informed of the fact that such was the rule of construction announced by the supreme court in this state. Considering both of these propositions, the conclusion is irresistible that, when the legislature re-enacted the statute, it intended that it should have precisely the same effect that it had before.

The foregoing propositions and authorities would seem sufficient to settle these cases without pressing the argument any further. But out of abundance of caution we shall submit a brief argument to the court on the original merits of the controversy, in order to show to the court that the original decision in 68 Miss. was in itself perfectly sound, and was fully in accord with the later adjudications of the state and federal courts, even after a lapse of more than twelve years. The question here is not one of legislative power, but of legislative intent.

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Brief for appellee.

It is not a question of what the legislature might have done, if it had seen proper, but of what in fact it has done. This discrimination must be steadily kept in view in this case. The recent literature on this general subject and the recent decisions are quite extensive, and we give references here which will cover the whole field of later discussion. *Boyd* v. *Selma* (Ala.), 16 L. R. A., 729, and note; *Holland* v. *Commissioners* (Mont.), 39 Pac., 575, 27 L. R. A., 797; *Insurance Co.* v. *Assessors* (La.), 25 South., 970, 45 L. R. A., 524, 72 Am. St. Rep., 483; *Savings Soc.* v. *Multnomah County,* 167 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803; *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174; *Western Assur. Co.* v. *Halliday* (C. C.), 110 Fed., 259; *Walker* v. *Jack,* 88 Fed., 576, 31 C. C. A., 462 and notes; *Board* v. *Fidelity Co.* (Ky.), 64 S. W., 470; *Village of Howell* v. *Gordon* (Mich.), 86 N. W., 1042; *Hayward* v. *Board,* 92 Md., 509; *Trust Co.* v. *San Francisco,* 128 Cal., 589, 61 Pac., 178; *Russell* v. *Croy,* 164 Mo., 69, 63 S. W., 849.

Not Taxable as an Interest in Lands.— It would seem to be sufficient to say on this topic that neither is it an open question in this state. The point was necessarily involved in *State* v. *Smith,* 68 Miss., 79, 8 South., 294, and was settled by that decision. The court could not have reached the conclusion announced without holding that the mortgagee had no interest in the lands. So, also, the same point was necessarily involved in all of the cases cited above in which it was held that foreign-held mortgages are not taxable. The theory itself seems to be based on an erroneous application of certain cases in a few states, where there are special statutes controlling; and those cases shall be considered later. For many years it has been the settled law in Mississippi, and it is a rule of property, that, whatever may be the law in other states, here a mortgagee has no "interest in the land," either legal or

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Brief for appellee.

equitable. *Buckley* v. *Daley,* 45 Miss., 338; *Freeman* v. *Cunningham,* 57 Miss., 67; *Beckett* v. *Dean,* 57 Miss., 232.

In *Buckley* v. *Daley, supra,* decided in 1871, speaking of the effect of an execution sale of the interest of one Woodman, a mortgagee, this court said: "By the adoption of principles long established in chancery, it has become well settled in courts of common law that the mortgagee, until foreclosure, has only a chattel interest; that a mortgage is but a charge upon the land; and that whatever will give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts. It will go to executors. The assignment of the debt will draw the land after it. From these properties of the mortgagee's estate, it appears in the strongest manner that it is not in the land, but in the security only. . . . . If this view of the law be correct, it follows that Buckley acquired no title to or interest in the lots purchased by him under his judgment in the attachment against Woodman. Woodman had no interest in these lots except a security for his debt. The debt is the principal, and the land is only an incident."

In *Freeman* v. *Cunningham, supra,* decided in 1879, speaking of our statute (article 12, p. 308, of the Code of 1857; section 2295 of the Code of 1871), this court said again: "It is not the effect of the statute cited to make the mortgagee or grantee the legal owner, after breach of the condition, except so far as is necessary to make the security available. He may assert title for that purpose, but he has no beneficial ownership. He may maintain ejectment, but only as a means to the end of enforcing the security. He may sell in pursuance of a power in the instrument, but he has no title which is vendible under execution against him. . . . . Under it the mortgagor, or grantor in a deed of trust, is to be considered the owner of the legal title, until a sale under the instrument, as if he had not executed it, subject only to the right of the mortgagee, or his

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Brief for appellee.

assigns, or the trustee, after breach of the condition; but, even after condition broken, until a sale by virtue of the instrument, as to all others, except the mortgagee or his assigns, or the trustee, the mortgagor or grantor is to be considered the owner of the legal title, unaffected by the incumbrance."

In *Beckett* v. *Dean, supra,* decided in 1879, this court said further: "A deed of trust to secure a debt is but a security, an incumbrance, and not an estate, legal or equitable, in the beneficiary, who may resort to the property conveyed as a means to the end of obtaining payment of the debt secured, but has no interest in the property, or right to it, except as an instrument to the chose in action secured by it."

Here we have, then, repeated announcements by our own supreme court to the effect that the mortgagee has no estate or interest in the land itself, either legal or equitable. The decisions are avowably constructions of our own state statutes about mortgages, and the last of them was made in 1879. The statute so construed was afterwards literally re-enacted in the Code of 1880 as section 1204, and again in the Code of 1892 as section 2449. These re-enactments, of course, and under the rule and authorities cited above, carried the construction placed on the statute by this court. It therefore has long been in this state, as a rule of property, settled in the most binding and conclusive manner, that a mortgagee has nothing of title or interest in the land itself. Nor is the rule so established and announced peculiar to Mississippi. It is the usual rule of our sister states. *Walker* v. *Jack,* 31 C. C. A., 469, note; *Latrobe* v. *Mayor,* 19 Md., 13; *Holland* v. *Commissioners* (Mont.), 39 Pac., 575, 27 L. R. A., 797; *Board* v. *Fidelity Co.* (Ky.), 64 S. W., 470.

The appellant will probably rely on *Savings Society* v. *Multnomah County,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, as authority for a different view; but it is not such authority. It is true that Mr. Justice Gray, who delivered the opinion of the court, in criticising the case of the *State Tax on Foreign-*

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Held Bonds, 15 Wall., 300, 21 L. Ed., 179, and in combating certain remarks in the case which he conceived to be inaccurate, himself employs some language not exactly accurate; but the decision itself, and the general tenor of the opinion, are neither of them in conflict with the Mississippi rule as announced by this court. The *Multnomah County Case* was on a tax assessed on a special statute of Oregon, which provided for the taxation of mortgages and expressly provided that they "shall, for the purpose of assessment and taxation, be deemed and treated as land or real property." Said Justice Gray: "The result is that nothing is taxed but the real estate mortgaged; the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation." The question was whether the mortgagee has had such an interest in the land as would allow the legislature to enact a law which should declare that interest to be real estate, and taxable (the total single tax on the land being apportioned between him and the mortgagor), without depriving the mortgagee of his property without due process of law. The constitutionality of the statute was sustained; but the court expressly bases its opinion on the statute, and in the clearest manner recognizes the fact that, in the absence of a statute declaring a mortgagee's interest to be real estate, the rule announced in *State* v. *Smith,* 68 Miss., 79, 8 South., 294, would be correct. On page 431, 169 U. S., p. 392, 18 Sup. Ct., 42 L. Ed., 803, the opinion answers the society, appellant, by noting that in the numerous cases cited by it "there was no statute expressly taxing mortgages at the situs of the land." All that the *Multnomah County Case* really holds is this: That the connection of a mortgagee with the land is a sufficient interest therein, in constitutional law, to enable the legislature by express enactment to tax it as real estate interest; but at the same time the case clearly recognizes the doctrine for which we contend — that in the absence of such statute there is no interest taxable as lands under the general law. Else, why

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Brief for appellee.

such a long and labored opinion? That such is the true construction of the *Multnomah County Case* is further shown by the manner in which the same court treated the question of foreign-held mortgages in the later case of *Bristol* v. *Washington County,* 177 U. S., 133, 20 Sup. Ct., 585, 44 L. Ed., 701. In this case there is a long and interesting opinion by the Chief Justice. He does not decide outright, as he manifestly would have done, had the *Multnomah Case* so held, that mortgages, as such, are taxable as real estate under the general laws; but, on the contrary, he plainly recognizes that they are not, and proceeds to argue that in the case before him they were taxable as personal property because of their "business situs."

It certainly seems clear that mortgages cannot be taxed at one and the same time both as realty and personalty. Such is the indubitable suggestion of the *Multnomah Case.* In this state, from time immemorial, they have been taxable as solvent credits; and that is surely their legal status. Even if there were direct conflict between the *Multnomah Case* and *Beckett* v. *Dean,* 57 Miss., 232, it would make no difference here. The question is one, in its nature, of local law. It is a question of our land titles, and especially of titles under our state statutes; and on such questions the decisions of the state courts are controlling, and will be followed by the supreme court of the United States itself. *May* v. *Tenney,* 148 U. S., 60, 13 Sup. Ct., 491, 37 L. Ed., 368. The authority of the *Multnomah Case* would extend only to the other question of the validity under the constitution of the United States of a statute similar in effect to that of Oregon, which was the real question in that case. We do not question the power of the legislature to enact such a statute, but only affirm that it has never done so, and that, in the absence of such a statute, a tax cannot be assessed under the general laws taxing lands. We have already noted the recognition of this proposition necessarily implied in the *Multnomah Case* and the *Bristol Case* above. See, also,

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Brief for appellee.

Holland v. *Commissioners* (Mont.), 39 Pac., 575, 27 L. R. A., 797; *Board* v. *Fidelity Co.* (Ky.), 64 S. W., 470; *Walker* v. *Jack,* 31 C. C. A., 469, note; *Latrobe* v. *Mayor,* 19 Md., 13.

An examination of the statutes which in several states have been held to impose a liability to taxation on mortgages as a real estate interest, or one of that nature, will be helpful.

(1) The Oregon statute, applied in *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462, and in various Oregon cases in the state and inferior federal courts, and held to be constitutional in the *Multnomah Case, supra,* is quoted in that case. See 169 U. S., 423, 18 Sup. Ct., 392, 42 L. Ed., 803. It provides expressly that "a mortgage, deed of trust, contract, or other obligation, whereby land and real property situated in no more than one county in this state is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property"; and section 2 of the act directed the assessment to be made "in the city, county or district in which the land or real property affected by such security is situated."

(2) The constitution of California, adopted in 1879, by section 4, article 13, provided expressly that "a mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby," and also that "the value of said security shall be assessed and taxed to the owner thereof, in the county, city or district in which the property affected thereby is situated." In *Doland* v. *Mooney,* 72 Cal., 34, 13 Pac., 71, it was held that under a sale of this interest, described as the mortgage interest, for delinquent taxes, the purchaser was entitled to recover the land itself. What an anomaly, and what a revolution in land titles such a holding would amount to in this state! See analysis of this provision and its effect in *Trust Co.* v. *San Francisco,* 128 Cal., 589, 61 Pac., 178.

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Brief for appellee.

(3) The third amendment to the constitution of Missouri, adopted in 1900, is taken literally from the constitution of California. The provision was held to be unconstitutional in *Russell* v. *Croy,* 164 Mo., 69, 63 S. W., 849, because of its discrimination against corporation mortgages; and in this case will be found an interesting discussion of the futility of such legislation, which the people of California had practically nullified.

(4) The statute of Michigan, adopted in 1891 (Pub. Acts 1891, p. 280, No. 200, sec. 2), provided expressly that "any real estate mortgage, deed of trust, contract, or other obligation by which a debt is secured, when land within this state is pledged, ... shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." While the statute does not in express terms declare that the assessment of the mortgagee's interest must be made in the county where the lands lay, the directions generally were such that it could not be done elsewhere. For discussions of this statute, see *Common Council* v. *Assessors,* 91 Mich., 78, 51 N. W., 787, 16 L. R. A., 59.

(5) The Maryland statute of 1896 was more doubtful in its terms, and needed construction. It provided that "all mortgagees or assignees holding mortgages of record in this state shall annually pay a tax of 8 per centum upon the gross amount of interest covenanted to be paid, ... to be collected by the proper authorities as other taxes for county and state purposes in the several counties, ... and the tax hereby levied shall each year be paid in the county . . . . where the greater portion of the property covered by the mortgage is located." Laws 1896, p. 160, ch. 120, sec. 146a. In *Allen* v. *Bank,* 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517, it was held that, although the act did not in express terms tax the mortgagee's interest, the language was so fixed as to fix the situs of that interest in the county where the land was

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located. Emphasis is also laid on the fact that in Maryland a mortgage is more than a mere lien, but also, immediately on execution, is an estate at law, defeasible only in equity.

(6) In Massachusetts, "chapter 11 of the public statutes provides, in substance, that, when any person has an interest as mortgagee of real estate under a duly recorded mortgage given to secure the payment of a fixed sum, the amount of his interest shall be assessed as real estate in the place where the land lies, and that, for the purpose of taxation, mortgagors and mortgagees shall be deemed joint owners until the mortgagee takes possession." *Insurance Co.* v. *Commonwealth,* 137 Mass., 80.

(7) The New Jersey state statute of 1876 also expressly provided for the taxation of mortgages in the county where the mortgaged lands were situated. *State* v. *Runyon,* 41 N. J. Law, 98. In this case, also, it was said that a mortgage in New Jersey created an estate in the land. See page 104.

It will be seen, therefore, that in all of those statutes there is either an express declaration that a mortgage shall be deemed real estate, or else an express taxation of mortgages, coupled with a direction that the tax shall be assessed and collected in the county or district in which the lands shall lie. But in Mississippi there is no such statute. The general laws in regard to the taxation of lands contain no references to mortgages; and the only statute which does deal with securities is section 3757, which expressly declares that the same shall be taxable, not where the lands affected shall lie, but where the persons holding the same shall reside or have a place of business. Clearly it is by this law left as a matter of taxation of the debt, and not of real estate interest.

Not Taxable as Personalty Located Here.— Coming back, now, to the question directly raised in the Coahoma county suit, we repeat that it is settled by *State* v. *Smith,* 68 Miss., 79, 8 South., 294; but we will redeem our promise

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Brief for appellee.

to show that the case is fully in accord with the later decisions, state and federal. The only difference between the two cases consists in the fact that in the case at bar it appears that when the loan company accepts a loan offered by the Coahoma county lawyer, who gets up the business, it pays him a commission; but the agreement further expressly recognizes that such lawyer is the attorney of the borrower, for it says that "these securities are signed and acknowledged by the borrower and delivered to his attorney with the understanding that he is to transmit them to the defendants' office at Memphis," etc. However, it would make no difference if such attorney were the agent of the company; for it is well settled that the employment, to such extent only as would be shown in this record, even then, does not give the credits a business situs.

In *Hayward* v. *Board of Review,* 189 Ill., 234, 59 N. E., 601, in a case much like the one at bar, only stronger in facts looking toward the right to tax, it was said, after referring to the rule that credits have their taxable situs at the domicile of the creditor, that "an exception to this rule may exist where the credits are kept in the limits of the state, and employed permanently in business by the owner, though a nonresident, or by an agent of the owner residing in the state and having the physical control of the papers and writings evidencing the credits. But in the case at bar the notes, etc., constituting the credits were not kept in the state. . . . . The fact that the appellant had an agent in this state to receive applications for loans and transact other business, and he came to Illinois at regular intervals, but only temporarily, for the purpose of transacting business with reference to these credits, did not constitute him a resident of the state within the meaning of that word; and in the absence of proof that the notes, mortgages, etc., which evidenced the credits were actually in Illinois, there was no ground on which to declare a separation of the situs of the credits from the domicile of the appellant."

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Brief for appellee.

In *Walker* v. *Jack,* 88 Fed., 576, 31 C. C. A., 462, Judge Taft, for the court, said, on page 578, 88 Fed., page 464, 31 C. C. A.: "Intangible personal property, however, like choses in action and credits, can, as a general rule, only be taxed at the residence of the owner. . . . . Certain exceptions to this rule are recognized. . . . . Another exception is where, though the beneficial interest in the debt is owned by a nonresident, yet the money is invested, the debt is contracted, and the investment is controlled by a resident agent of the owner. In such case it is held that the money and the credit in which it is invested are within the state, where the agent receives the money for his principal, and makes the loan, having the authority to collect it and reinvest it. . . . . In such cases the circumstance that the agent has in his possession the evidence of the indebtedness is regarded as of importance." See, also, the elaborate and luminous note to above case in 31 C. C. A., especially subdivision 4, on pages 469-471, as to the general subject, and subdivision 5, on page 472, as to the possession, etc., of an agent. The conclusion of the note is as follows: "But at any rate it is quite clear that, in order that the property of nonresidents should thus become amenable to the revenue laws of the state, it is necessary that the resident agent should have an actual and effective control over it. If the securities are merely in his hands for the purpose of collecting the principal and interest and remitting the same to his employer (*Myers* v. *Seaberger,* 45 Ohio St., 2332, 12 N. E., 796), or if the agent does not occupy the position of a trustee, clothed with discretion and choice as to the investments to be made, but acts merely under the specific directions of the nonresident owner of property, the state does not acquire any jurisdiction for the purposes of taxation (*Boardman* v. *Supervisors,* 85 N. Y., 359). On the same principle, promissory notes and other choses in action placed in the hands of an attorney within the state simply for collection, and municipal bonds placed tempo-

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Brief for appellee.

rarily on deposit in a bank in the state merely for safe-keeping, and belonging to a *bona fide* resident of another state, are not subject to taxation. *Herron* v. *Keeran,* 59 Ind., 472, 26 Am. Rep., 87."

See, also, *Board* v. *Fidelity Trust Co.,* a Kentucky case decided in October, 1901, not yet reported officially, but found in 64 S. W., 470. And see *Village of Howell* v. *Gordon,* a Michigan case, decided in 1901, not yet officially reported, but to be found in 86 N. W., 1042. A pamphlet copy is filed in this case as part of this brief. This is a noteworthy case, when compared with the previous Michigan cases.

In *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174, a resident of Louisiana died, leaving a large estate in money on deposit in New Orleans banks and in notes secured by mortgages on New Orleans lands. His heirs were minors in New York, and Mary Stemple was their New York guardian. The decedent's estate had been settled in the proper courts of Louisiana, and the New York guardian had been put in possession of the property. The Louisiana statute, amongst other pertinent provisions, expressly declared that "all bills receivable, obligations, or credits arising from business done in this state, are hereby declared assessable within this state," etc. The supreme court, after setting forth carefully the facts (1) that the property in question was clearly property arising from business done in Louisiana, being property of the deceased, a resident of New Orleans; (2) that the same had never been out of the state, but the money was still on deposit in New Orleans banks, and the notes and mortgages were still in New Orleans in the hands of an agent of the plaintiff; and (3) that "evidently the moneys were to be kept in the state for reinvestment or other use," and that the credits were in the hands of a local agent for the same purpose — holds that under those circumstances they were taxable under the Louisiana statute. This case does not in fact announce any new rule, or

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Brief for appellee.

any novel application of the old rule. It shows that the supreme court of the United States is exactly in line with the courts of the states on this subject. The most noteworthy feature in this case is its re-establishment of the authority of the case of *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 21 L. Ed., 179, which had been apparently in a measure overruled in the *Multnomah County Case;* and it is to be especially noted that in discussing that case, and explaining it, and re-establishing it in its true place, the court says of it that its language "is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages, when those properties are not in possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession."

Bristol v. *Washington County,* 177 U. S., 133, 20 Sup. Ct., 585, 44 L. Ed., 701, is to the same effect. The credits were there held taxable because, after and in continuance of a long-established course of business of lending money by a New York citizen in the town of Stillwater, Minn., the business was continued as before, except that, in order to avoid the tax laws, the notes themselves were sent to New York. But the court said: "But these notes were payable, as before, at the office of the agents in Minnesota, the mortgages securing the notes were retained by the agents, and the notes were returned to the agents from time to time, whenever required by them, for the purpose of renewal, collection, or foreclosure of securities. The agents continued to collect the money due on the notes, and to make loans in the name of Mrs. Bristol, sometimes under her husband's direction, but generally on their own judgment," etc. (page 143, 177 U. S., page 585, 20 Sup. Ct., 44 L. Ed., 701). The court will see this is nothing, in effect, but our own case, *Jahier* v. *Rascoe,* over again. Of course, the business so located was taxable.

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Brief for appellee.

We submit that the decision of the circuit court of Coahoma county was correct, and should be affirmed.

Deprivation of Property Without Due Process of Law.— This question must be investigated from two points of view: (1) As to the attempt to tax loans as personalty (the Coahoma case); and (2) that attempt to tax them as an interest in the lands (the Copiah case).

First. The case of *New Orleans* v. *Stemple, supra,* settles the question, in the passage quoted above, that the taxation of credits, even in the concrete form, when the notes and lands are actually kept in the possession of the nonresident owner, is beyond the power of the state. The later case of *Bristol* v. *Washington County* modifies that doctrine to the extent of holding that the nonresident owner may retain possession of the notes, yet still localize his business in the state; but localizing must be done by the establishment and maintenance of a permanent course of business, including the making of the notes themselves payable at the place where said business is carried on, and the appointment of a regular agent, with power to renew, collect, and reinvest, and all on his own judgment. No such condition of things exists in the case at bar; and we submit that, if the statute is construed as authorizing this tax, it violates the fourteenth amendment of the constitution of the United States. Both of the cases above postulate the fact that, if the tax is unlawful, it does violate that amendment; and the *Multnomah County Case,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, in order to avoid this difficulty, very carefully and emphatically points out the fact that the Oregon statute imposed no tax on the credits as such.

Secondly. As to the effort to tax as a real estate interest, it seems to be settled by the *Multnomah County Case* that, as a general proposition, it can be done. We have argued above that a statute authorizing such a tax is necessary, and that we have no such statute in this state. If, however, the court should

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Brief for appellee.

hold differently, we submit that said holding cannot be applied in these cases, so as to give it retrospective operation. The loans were made under, and manifestly because of, the holding of this court in the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, which was a construction of the very statutes now existing. This is the precise point passed on by this court in *Yazoo & Miss. Valley R. R. Co.* v. *Adams* (decided at the October term, 1902), 81 Miss., 90, s. c., 32 South., 937. Judge Cayce, for the court, said: "The property in controversy here is liable for the taxes for the years claimed, unless relieved therefrom by the operation of the rule of property as it existed at the time the appellants became owners of it, so operating as to create an estoppel on the state. A 'rule of property' is a settled legal principle governing the ownership and devolution of property. This principle can be settled only by the supreme court of the state, and its utterances, in cases pending before it involving the title to property, construing statutes or constitutional provisions, have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was, in the case, involved or necessarily considered, and determined by the court in the case then pending before it; and such rule of property, when so established, becomes and remains the settled legal principle governing the question and title to property to which construction is applicable, so long as such decision remains unreversed by the supreme court giving such construction. If such construction is given upon an issue directly involved in the case, or, necessarily considered, necessitates the application of the judicial mind to the precise question, then immediately the rule of property established thereby becomes the law for similar cases, and is upheld and continued in the future by the doctrine of *stare decisis.*"

In conclusion, it remains only to say that the policy of taxing this class of credits is a political, and not a judicial, question — a matter for the legislature, and not for the courts. If under

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Brief for appellee.

the existing laws they are not taxable, no doubt the former legislatures had their reasons for putting the laws in such shape; and any succeeding legislature can alter the law if it shall see fit so to do. Doubtless some future legislature will do so, just as soon as the public mind of this state becomes convinced that we need that additional source of revenue more than we need the comparatively cheap foreign money which immunity from local taxation brings to us. "More taxes, more interest," is the inexorable business law. The legislature must deal with it.

James H. Watson, for appellee.

By consent of counsel these two cases are to be heard together. The facts are the same in both cases, and involve but a single question, to wit: Are the debts held and owned by the appellee, secured by trust deeds and mortgages on land situated in the state of Mississippi, taxable under existing laws?

As shown by the records, the appellee is an English corporation, with an office in the city of Memphis, in the state of Tennessee. Through this office the loans now sought to be taxed were made. All applications for loans are submitted to Mr. N. F. Le Master, the manager of the Memphis office. They are forwarded usually by the local attorneys of the would-be borrowers, although occasionally these applications come direct from the applicants themselves. On receipt of an application the company has the lands mentioned therein inspected by some person whom it employs for that purpose, and if they are shown by his report to be adequate security for the amount desired, and the applicant's title is found, on examination by the company's attorney, to be good and valid, the notes and trust deed are prepared in the Memphis office and forwarded to the applicant, or his attorney, to be executed and recorded. When this is done, the papers are returned to the Memphis office, and, if found to be in proper shape, the money is then paid over to the

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Brief for appellee.

borrower. This all appears in the agreed statement of facts upon which the Coahoma county case was tried, but the details are not fully set forth by the complainant in his bill in the Copiah county case. The applicant does allege, however, that the defendant (appellee) is an English corporation, with an agency in the city of Memphis, and the evidences of the debt secured by the trust deeds and mortgages sought to be taxed are in the defendant's possession at its domicile beyond the state, and that they represent money loaned to various parties by the defendant through its agent, Le Master, at Memphis, and that the defendant has no agent in this state to lend money.

The Coahoma county suit was a proceeding by attachment at law for the amount of taxes alleged to be due on the various trust deeds, in which the defendant is the beneficiary, on the lands situated in Coahoma county. The plaintiff's claim, as set forth in his declaration, was for the taxes of 1898 and 1899 upon "solvent credits" owned by the defendant. The defendant pleaded the general issue, with notice of the special matter which it expected to prove. Upon this plea there was a verdict and judgment for the defendant. In the Copiah county chancery suit, however, it is alleged that the defendant "owns certain real and personal property lying and being wholly in Copiah county, Miss., which escaped taxation for the year 1901, to wit: the interest of the said Colonial & United States Mortgage Company, Limited, as mortgagee and *cestui que* trust in the following mortgages and trust deeds, recorded in the record of trust deeds and mortgages of said county, held by it as security for loaned money on lands lying wholly in Copiah county, Miss." Then follows a statement showing the amount, date, book, and page where recorded, and the names of the mortgagors in the several trust deeds recorded in Copiah county, securing debts due the defendant. Notwithstanding the allegation, I submit that the two cases are substantially the same, and that the fact that these debts were assessed in Coahoma county as "solvent

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Brief for appellee.

credits," and in Copiah county as "real and personal property," makes not the slightest difference, unless the astute and learned counsel for the appellant can now make it appear to this court that a thing is what they call it, and not what it really is.

In the case appealed from Copiah county the defendant interposed a demurrer to the bill of complaint, which was sustained, and the bill dismissed. Under the authorities there could have been no other result in either case. It must be borne in mind that the defendant is a nonresident, without either office or agent in the state of Mississippi; that the loans assessed for taxation are made through its Memphis office; and that before the money is paid to the borrower his notes, together with the trust deed securing the same, duly executed and recorded, are in the hands of the defendant's agent beyond the limits of the state. In other words, the appellee's alleged liability is based solely upon the facts that the debtors reside, and the loans are secured by trust deeds upon lands lying, in the one case, in Coahoma county, and in the other, in Copiah county, Mississippi. Unquestionably the general doctrine is that debts have their situs at the domicile of the creditor, and the state has no greater power or jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresident which is situated without the state.

"To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . . . But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners." *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 21 L. Ed., 179.

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Brief for appellee.

"Debts have their situs at the domicile of the creditor, because debts are property, and have a value which is inseparable from the creditor." *Meyer* v. *Pleasant,* 41 La. Ann., 645, 6 South., 258; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 44 La. Ann., 760, 11 South., 91, 16 L. R. A., 56.

"It is an accepted principle of the law of taxation that intangible personal property, such as credits, claims, and other choses in action, follows the person of the owner, and can have no local habitation other than his. Consequently, in the absence of any statute establishing a different rule, the situs of all such intangible personal property, for purposes of taxation, is at the domicile of its owner, and nowhere else." *Grundy County* v. *Tenn. C., I. & R. R. Co.,* 94 Tenn., 295, 29 S. W., 116; *Worthington* v. *Sebastian,* 25 Ohio St., 1; *Barber* v. *Farr,* 54 Iowa, 57, 6 N. W., 134.

As declared by the supreme court of Louisiana in *Liverpool & L. & G. Co.* v. *Board of Assessors, supra,* "The state has no greater power of jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresidents which is not situated in the state." And it will doubtless be conceded that the taxing power of a state can only be exercised upon subjects within its jurisdiction.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to only these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape — in its natural condition, in its manufactured form, and in its various transmutations. The amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost

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Brief for appellee.

infinite form in which it is conducted — in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state, as to mode, form, and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction. Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in the debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . . . The property mortgaged belonged entirely to the company, and, in so far as it was situated in Pennsylvania, was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. . . . . The property in no sense belonged to the nonresident bondholder, nor to the mortgagee of the company. The mortgage transferred no title. It created only a lien upon the property. Though in form a conveyance, it was both at law and equity mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In *Witmer's Appeal,* 45 Pa., 463, 84 Am. Dec., 505, the court said: 'The mortgagee has no estate in the land, any more than a judgment creditor. Both have liens upon it, and no more than a lien.' . . . . Such being the character of a mortgage in Pennsylvania, it cannot be said that the nonresident holder and owner of the bonds secured by a mortgage in that state owns any real estate there. A mortgage being there a mere chose in

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Brief for appellee.

action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, and, upon a given contingency, to enforce, by its sale, the payment of his demand. The right has no locality, independent of the party in whom it resides. It may undoubtedly be taxed by the state, when held by a resident therein, but when held by a nonresident it is as much beyond jurisdiction of the state as the person of the owner." *State Tax on Foreign-Held Bonds,* 15 Wall., 319, 320, 322, 21 L. Ed., 179.

Under the decisions of this court the nature of a mortgage is the same in Mississippi as it is in Pennsylvania. *Beckett* v. *Dean,* 57 Miss., 236; *Freeman* v. *Cunningham,* 57 Miss., 67; *Strickland* v. *Kirk,* 51 Miss., 799. I willingly concede that the rule of comity, *"Mobilia personam sequuntur,"* may be modified by legislative power in many respects. Movables may be taxed in the state in which they are actually located, though the owner resides elsewhere, and even debts may assume such concrete form in the evidences thereof that they may be similarly subjected, when such evidences are situated in the state.

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of the owner, will in many cases determine the state in which it may be taxed. The same thing is true of public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former by general usage have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner. The latter are treated and pass as money wherever they are. But other general property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not

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Brief for appellee.

separated from the possessions of the owners." *State Tax on Foreign-Held Bonds,* 15 Wall., 323, 324, 21 L. Ed., 179.

In the later case of *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174, Mr. Justice Brewer reviewed the decisions of all the various states upon this subject, and held that notes secured by mortgages on real estate in Louisiana, and in actual possession of the owner's agent in the city of New Orleans, are there taxable, although the domicile of the owner was in the state of New York. The case arose under a statute very similar to section 3757 of the Annotated Code of 1892, under which appellant is now seeking to fix a liability upon the appellee. The Louisiana statute (sec. 7, No. 106, p. 124, Acts La., 1890), after declaring that it is made the duty of all tax assessors "to place upon the assessment list all property subject to taxation," closes with this provision: "And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact any business here without paying to the state a corresponding tax with that exacted of its own citizens, and to all bills receivable, obligations or credits arising from the business done in this state and at the business domicile of said nonresident, his agent or representative." In the case of *New Orleans* v. *Stemple, supra,* the bonds, mortgages, etc., of the defendant were held to be taxable by the state of Louisiana, solely upon the ground that the evidences of these debts were in "concrete form," and were actually situated in the state. At the same time the court distinctly declared that such property had no situs independent of the domicile of the owner, and could have none unless such concrete evidences of debt were separated from the possession of the owners. The power of the legislature to establish an independent situs for bonds and mortgages when they are not in possession of the owner was conceded; the court observing, however, that "the

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Brief for appellee.

fiction of law so often referred to, viz.: *'Mobilia personam sequuntur,'* declares their situs to be that of the owner — a declaration which the legislature has no power to disturb when in fact they are in his possession."

Notwithstanding the doctrine, so well settled, that the situs of notes, mortgages, etc., for purposes of taxation, is at the domicile of the owner, it has always been held subject to this modification, that wherever they are separated from the possession of the owner, and situated in some other state where the owner resides, thus enabling the owner to escape the injustice of double taxation. And in the states of Kansas, New York, Missouri, California, South Dakota, Minnesota, Oregon, North Carolina, Nebraska, and perhaps others, it has been repeatedly held that the state has no power to tax a citizen on money due him in another state, when the evidences of indebtedness were in the hands of an agent for collection in the state of the domicile of the debtor. Because they have an independent situs, they may be taxed where they are situated. *Wilcox* v. *Ellis,* 14 Kan., 588, 19 Am. Rep., 107; *Fisher* v. *Rush County Com'rs,* 19 Kan., 414; *Blain* v. *Irby,* 25 Kan., 499; *People* v. *Smith,* 88 N. Y., 576; *State* v. *St. Louis County Ct.,* 47 Mo., 594-600; *People* v. *Home Ins. Co.,* 29 Cal., 533; *Billinghurst* v. *Spink County,* 5 S. D., 84, 58 N. W., 272; *In re Jefferson,* 35 Minn., 215, 28 N. W., 256; *Poppleton* v. *Yamhill County,* 18 Or., 377, 23 Pac., 253, 7 L. R. A., 449; *Redmond* v. *Rutherford Com'rs,* 87 N. C., 122; *Finch* v. *York County,* 19 Neb., 50, 26 N. W., 589, 56 Am. Rep., 741.

Although, as already shown, the general consensus of opinion is that, for the purpose of taxation, the situs of mortgages is at the domicile of the owner, and that this rule cannot be changed, even by legislative power, so long as the mortgages themselves remain in the actual possession of a nonresident owner, yet in some few of the states laws have been enacted providing for the taxation of mortgages held by nonresident creditors as an inter-

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Brief for appellee.

est in realty, and the courts have sustained their validity. In Oregon it has been held that a state has power to tax a mortgage, as such, in the county where it is recorded, or where the land lies, irrespective of the residence of the owner. *Ankeny* v. *Multnomah County,* 3 Or., 386. And the supreme court of the United States has affirmed the validity of the Oregon law, so far as to hold that the rule of taxation thereby introduced does not violate any rights of citizens of other states secured to them by the constitution of the United States. *Savings & Loan Society* v. *Multnomah County,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803. It was held in these cases that, conceding that the debts followed the person of the owner, and, in case of a nonresident, would be beyond the jurisdiction of the state, yet the mortgage, considered as a security, was local and within the jurisdiction, and might, therefore, be taxed as such. "The sophistry of this reasoning is very apparent, when we reflect that, on the concession here made by the court, the state where the creditor resides may be taxed upon the debt secured by the mortgage, and thus he would be liable to double taxation for the same item of property — once in his own state on the debt, and once in Oregon on the instrument which evidences and secures it. If further refutation is needed, it is sufficient to point out that a security divorced from the debt which it secures is a phantom, and can have no taxable value." It has also been held by the supreme court of Michigan that a mortgage on land so far partakes of the character of realty that it is competent for the legislature to provide that the mortgage of a nonresident mortgagee shall be taxable where the land is situated. *Common Council of City of Detroit* v. *Board of Assessors,* 91 Mich., 78, 51 N. W., 787, 16 L. R. A., 59.

In both the Oregon and Michigan cases, the courts were dealing with a statute which in terms imposed a tax upon a mortgage interest in lands. Of course, however, there must be statutory warrant for such taxation; for, if the legislature

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omits any property from the list of taxables, the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation. *New Orleans* v. *Stemple,* 175 U. S., 312, 20 Sup. Ct., 110, 44 L. Ed., 174. Hence, in the absence of any such statute in the state of Mississippi, the Oregon and Michigan cases have no application to the cases at bar. The only statutory warrant for such taxation in the state of Mississippi is to be found in section 3757 of the Annotated Code of 1892, which is as follows: "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned in this state or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county in which such person may reside or have a place of business, or be temporarily located, at the time of the assessment." And this statute cannot be construed to provide, even by the remotest implication, for the taxation of mortgages as such. In fact, the very language of the statute excludes this idea, by fixing the situs of the property enumerated in the county "in which person may reside or have a place of business, or be temporarily located, at the time of the assessment." It is clear that the framers of this law not only gave full recognition to the universally accepted rule that the taxing power of a state can only be exercised upon subjects within its jurisdiction, but were also familiar with the doctrine that "movables follow the person"; and, if properly construed, the statute itself contains nothing inconsistent with either of these well-established principles of law. Therefore I might well content myself with merely calling attention to the fact that it is nowhere alleged or shown that the appellant, in either of the cases now before the court, resided or had a place of business, or was temporarily located, in either Coahoma county or Copiah county at the time of the assessment in these counties, or ever had an agent in the state

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Brief for appellee.

of Mississippi. This statute, however, has been already construed by this court, and has been held in the clearest and most unmistakable language not to render mortgages owned by nonresidents liable to taxation in the state of Mississippi. Mr. Justice Campbell, certainly the peer of any judge who ever sat upon this bench, in the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, which was identical in every particular with the cases now before the court, said: "In the case before us the creditor resides beyond the limits of this state, and has no agent in this state and no place of business here. The money was not sent here to be loaned. The evidence of the debt was not here. The business of lending money was not conducted in this state. The debt was secured by a mortgage on property in this state, and the loan was obtained by the application of persons in the state, transmitted to persons beyond its limits, who forwarded the money from without the state. It was not embraced by section 497 of the code." 68 Miss., 83, 8 South., 294. It is unnecessary for me to add that section 497 of the Code of 1880, then in force, is the same, word for word, as section 3757 of the Annotated Code of 1892.

In my humble opinion, it would really be a great misfortune if the law could be otherwise construed, as the taxation of mortgages securing money loaned by nonresidents to citizens of Mississippi would inevitably be attended by one of three results: Either it would drive foreign capital out of the state altogether, or the lenders would exact the highest legal rate of interest in every case, or the borrower would be required to pay the tax, in addition to the interest contracted for. I feel perfectly safe in the assertion that no nonresident corporation has ever taken a mortgage to secure a loan made to a citizen of this state that did not contain a stipulation binding the mortgagor, not only to pay the taxes assessed upon the land itself or his estate therein, but also such as might be levied on the mortgage debt or the interest of the mortgagee; and under the authorities such an agreement,

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Brief for appellee.

unless expressly forbidden by law, is perfectly valid and binding. Although the mortgage may provide for the highest legal rate of interest, the insertion of such an agreement does not render the instrument obnoxious to the laws against usury. *Common Council of City of Detroit* v. *Board of Assessors,* 91 Mich., 78, 51 N. W., 787, 16 L. R. A., 59; *Banks* v. *McClellan,* 24 Md., 62, 87 Am. Dec., 594; *Hammond* v. *Lovell,* 136 Mass., 184. Under the law as it now stands, however, I cannot see how it is possible for such a misfortune to befall the good people of the state of Mississippi. The conclusion reached by the lower court in each case, I submit, was correct, and should be affirmed.

H. R. Boyd, for appellee.

First. The first proposition is that there is no law or statutory provision in the state of Mississippi for the collection of taxes in cases of this kind. Section 3757 of the Code of 1892 (section 497 of the Code of 1880) is the only provision in the state of Mississippi that could, in our opinion, be relied upon as a basis for the assessment and collection of this tax. This section provides that every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money loaned at interest in this state, etc., shall be taxable for the same in the county in which person may reside or have a place of business, or be temporarily located, at the time of the assessment, etc. This section of the code has already been construed by the supreme court of the state in the case of *State of Mississippi* v. *Smith,* 68 Miss., 79, 8 South., 294. Judge Campbell, in delivering the opinion of the court, says that section 497 of the Code of 1880 applies to money loaned or employed in this state, where the person resides or has a place of business, or a location, or an agent in this state. There can be no doubt that where an agency is created in the state for the loaning of money, and the business of loaning is

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Brief for appellee.

carried on here, this state being the locality in which the transaction is begun and completed, and the debt acquires a situs here from the course of dealing between the lender and the borrower through the agency established here, it is taxable; but where the nonresident has no place of business, or location, or agent in this state, and accomplishes a loan beyond the limits of the state, the fact that the negotiations for a loan were made by persons in this state, and were secured by mortgage on property in this state, does not subject it to taxation here. This decision was rendered at the October term of the supreme court of 1890, and has been, and now is, the settled law in the state upon that subject, and has become, together with the statute, a rule of property, and is the same as though the decision had been itself incorporated into the statute by the legislature, so that all money loaned as in the cases at bar is protected by this statute and by this decision, which has become a rule of property which will not be changed or altered by any subsequent court, so as to change the contract liability heretofore entered into between the garnishees in this case and the appellee.

This honorable court, in the case of *Y. & M. V. R. R. Co., et al.*, v. *Adams, Revenue Agent,* 81 Miss., 90, s. c., 32 South., 937, on p. 946, say: "A 'rule of property' is a 'settled legal principle governing the ownership and devolution of property.' This principle can be settled only by the supreme court of the state, and its utterances in cases pending before it, involving the title to the property, construing statutes or constitutional provisions, have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was in that case involved, or necesasrily considered and determined by the court in the case then pending before it; and such rule of property, when so established, becomes and remains the settled legal principle governing the acquisition and title to property to which construction is applicable, so long as such decision remains unreversed by the supreme court giving such construc-

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Brief for appellee.

tion. . . . . All rights of property must be governed and protected by the laws existing and as they existed at the time of the vesting of the right. This principle, so manifestly in accordance with the plainest principles of justice, receives our fullest approval, and will be applied in all such cases coming within its scope. It is binding in proper cases upon the state as upon the individual. The state has not one law for the citizen and a different application of it to herself. It has received the sanction of the highest court of the land in many cases. In *Gelpcke* v. *City of Dubuque,* 1 Wall., 206, 17 L. Ed., 520, the supreme court of the United States say: 'The sound and true rule is that, if the contract when made was valid by the law of the state as then expounded by all of the departments of the government and administered in all its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature or decision of the courts altering the construction of the law."

The decision was rendered on November 18, 1902, and, if the principles of law announced in that decision, so recently made, are adhered to, the principle here contended for in the cases at bar must be governed by it, and from this it would seem that there can be no escape.

Second. The second proposition, that a personal property tax cannot be assessed against a nonresident, neither can the property of a nonresident be taxed, unless it has an actual situs within the state, and the situs of a credit is the domicile of the owner, has been so frequently discussed and passed upon by the courts of the country, both state and federal, that it would seem almost idle to raise the question again under the laws of the state of Mississippi as they exist. There has been a great unanimity in the decisions of the courts with reference to this proposition. A number of cases have been examined and collected upon this proposition, and a brief outline of some of the decisions will be here given, for the benefit of the court.

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Brief for appellee.

In the case of *Graham* v. *St. Joseph Tp.*, 67 Mich., 652, 35 N. W., 808, it is shown that Graham was the owner of a certain amount of stock in the Graham & Morton Transportation Company, a corporation organized under the laws of the state of Illinois. He resided in the state of Michigan and in the township of St. Joseph. His stock in this corporation was assessed to him in this township, and he paid the taxes levied against him under this assessment, protesting against the same; and he brought his suit to recover the taxes thus paid. It was conceded in the case that, if the plaintiff's stock was properly assessable in St. Joseph, then the tax was legal, but, if not, he should be entitled to recover. The court say that "a tax is a portion of the property of the citizen required by the government for its support in the discharge of its various functions and duties, and may be imposed when either the person or the property is within its jurisdiction. A personal tax cannot be assessed against a nonresident, neither can the property of a nonresident be taxed unless it has an actual situs within the state, so as to be under the protection of its laws. . . . . It is unquestionably the general rule that personal property can only be assessed to the owner at the place where he resides, and if it is sought to tax it in another jurisdiction, because of its tangible character and its location being there, the authority so to do must be plainly written in the statute." The court held that, Graham being a resident of St. Joseph township and owning stock in the corporation, he was personally assessed, and the stock had its situs in the state of Michigan, and was properly taxed there; and the decision of the court was manifestly correct. The facts in that case are different from the case at bar in this: that neither the defendant nor the credits are in the state of Mississippi. It has no jurisdiction over the defendant, or over the notes and mortgages held by it outside of the state.

In the case of *City of Davenport* v. *Miss. & Mo. R. R. Co.*, 12 Iowa, 539, the city of Davenport attempted to assess and

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Brief for appellee.

tax the holder and owner of the mortgage bonds issued by the railroad company and held by nonresidents of the state of Iowa, and the supreme court, in discussing that case, held that a mortgage executed by a railroad company on its depot grounds, road, and rolling stock, situated in that state, is not subject to taxation, upon the failure of the mortgagee to list when the holder or owner of the mortgage is a nonresident of the state, and that mortgages, before foreclosure, are choses in action, and as such attach to the person of the holder, and are taxable at the place of his domicile. They are not taxable in this state, when the owners are nonresidents.

The case of *People* v. *Eastman,* 25 Cal., 601, presents a case where the owner of a judgment of foreclosure lived in the city of San Francisco. The mortgage and the judgment were liens upon land in another county, and were assessed and the taxes attempted to be collected in the county in which the land lay, and not at the residence of the owner of the judgment or the note and mortgage. The supreme court of California say: "The money at interest, debt, or obligation is the principal thing, and the mortgage is only a security, a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it. A payment of the debt discharges the mortgage. The thing secured is intangible, and has no situs distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon the land in every county in the state; and, if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a situs subjecting it to taxation in that county, a party without further legislation might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and a mortgage in one county may be a different one from that in another, although the debt secured is the same. The fact that the mortgage has been foreclosed, and

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Brief for appellee.

the lien carried into a judgment, does not, in our opinion, change the character of the property with reference to the question under discussion. The principal thing is still a debt secured by a judgment lien, instead of a mere mortgage lien."

The case of *Board of Commissioners of Arapahoe County* v. *Cutter,* 3 Colo., 349, also presents a case where the board of commissioners had attempted to assess a note held by a resident of the state of California, secured by a trust deed upon real estate in Colorado, and the supreme court say "that personal property which has a locus here is without doubt subject to taxation under our revenue laws, which, while they in general can have no extraterritorial force, may reach all property within the state, without reference to the residence of the owner. A herd of cattle, a flock of sheep, a stock of merchandise owned by a nonresident, but kept within the state, are proper subjects of taxation; but debts due from a resident of California are in no legitimate sense the property of the debtor. They belong to the creditor. They have no situs apart from the residence of their owner, although the situs of the real estate by which the notes were secured was within the jurisdiction of the taxing power. The debts evidenced by the notes were the principal things, and the trust deeds securing them were mere incidents, depending for their very existence upon what they secured, and the liquidation of the debt would at once cancel the trust deeds. A trust deed itself is but a chose in action, attached to the person of its owner. A debt is invisible and intangible, following the creditor's domicile, and wherever that may be is within reach of the taxing power; but, as the domicile of the owner of the choses in action upon which taxes were paid was in California, it cannot be said that they constituted property within the law of the territory of Colorado, and were therefore the subject of taxation here"— citing *Railroad Co.* v. *Pennsylvania,* 15 Wall., 300, 21 L. Ed., 179, and many other cases.

In the case of *Worthington* v. *Sebastian,* 25 Ohio St., 10,

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Brief for appellee.

the supreme court of Ohio, in discussing the question of the right of the state of Ohio to tax stock in foreign corporations held by a citizen of Ohio, say that "intangible property has no actual situs. If, for purposes of taxation, we assign a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the debtor or the creditor. To make it follow the residence of the former is to tax the debtor, and not the creditor — to tax poverty, instead of wealth. That it is the creditor, and not the debtor, that is to be taxed, and that the tax is to be imposed by the law of the creditor's place of residence, and not by the law of the debtor's place of residence, seems to be quite well settled by authority" — citing *R. R. Co.* v. *Pa.,* 15 Wall., 300, 21 L. Ed., 179.

In the case of *Grant* v. *Jones,* 39 Ohio St., 506, there was an attempt made by the treasurer of Butler county, Ohio, to recover of Grant certain taxes upon notes and mortgages held by him in Lemon township, Ohio, where he had loaned a large sum of money to citizens of that township; but he was born in the county of Down, Ireland, and was a British subject, and never was a householder in the state of Ohio or in the United States of America. The supreme court, reaffirming the doctrine in *Worthington* v. *Sebastian, supra,* said that, "as to this class of property, the situs of the creditor, and not of the debtor, is to determine where the credits, investments in bonds, etc., are to be taxed, and that the tax is to be imposed by the law of the creditor's place of residence, and not by the law of the debtor's citing *Bradley* v. *Bauder,* 36 Ohio St., 28, 38 Am. Rep., 547, and a number of other cases on pages 514 and 515, 36 Ohio St., 38 Am. Rep., 547.

In the case of *Goldgart* v. *People,* 106 Ill., 25, the supreme court of Illinois held that, "if the owner be resident in the state, there is jurisdiction over his person and over the credits also, which, in legal contemplation, in the absence of anything

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Brief for appellee.

showing they have a situs elsewhere, accompany him. If the owner is absent, but the credits are in fact here in the hands of an agent for renewal or collection, with a view of reloaning the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing; but it is to be borne in mind it is credits, and not debts, that are the subject of taxation. The debtor cannot be taxed, and is not presumed to be by the statute, on what he owes. . . . . And so, in the case of a nonresident creditor not having parted with his credit, there is nothing here to tax; nothing here to which jurisdiction can attach. This is well settled by adjudicated cases"— citing cases. And this must be peculiarly so in the case of negotiable instruments. They are the subject of larceny, and their indorsement transfers the credits of which they are evidence. They are regarded as property, and, of course, this must be property having its situs where they are lawfully held.

In the case of *Gallatin Co.* v. *Beattie,* 3 Mont., 173, it was attempted to enforce a collection of a tax on a mortgage and note in one county of Montana, when the holder and owner of the note and mortgage was a resident of another county; and the supreme court held that the mortgages and notes were not properly assessed in the county in which the property lay, but that it could only be assessed to the owner in the county in which he lived.

In the case of *Barber* v. *Farr,* 54 Iowa, 57, 6 N. W., 134, the supreme court of Iowa held that the taxation of money and credits in the county other than the one in which the owner resides is without authority and void, and that he may maintain an action in equity to enjoin the collection of a tax. In the case of *Hunter* v. *Board of Supervisors,* 33 Iowa, 376, 11 Am. Rep., 132, the supreme court of Iowa held that, where a resident of that state had deposited for safe-keeping in Illinois some promissory notes that had never been brought by him into

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Brief for appellee.

the state, they were subject to taxation, and that the notes in such cases are merely evidences of the debts or rights represented, and these follow the person of the owner.

The supreme court of Missouri, in the case of *State* v. *County Court of Howard County,* quote from the opinion of Justice Field in *Railroad Co.* v. *Pennsylvania,* 15 Wall., 323, 21 L. Ed., 179, that it is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of the owner, will in many cases determine the state in which it may be taxed; citing *St. Louis* v. *Wiggins Ferry Co.,* 40 Mo., 580, sustaining the same doctrine.

The supreme court of Maryland, in the case of *Latrobe, Trustee,* v. *Mayor of Baltimore,* 19 Md., 15, have held that the recording of a mortgage in another county or district than that of a creditor's residence cannot have the effect of locating the debt where the mortgage is recorded.

In the case of *People* v. *Smith,* 88 N. Y., 576, the court of appeals of New York held that where a resident of this state was assessed for personal property which consisted of mortgage securities in the hands of his agents, residing in another state, who retained the custody of the securities from the time they were taxed, and received and re-invested the interest paid thereon, and upon payment of any security, under authority given them by their principal, discharged such security and reinvested the sums paid, without submitting the proposed loans to him for approval, and until the funds were invested, and kept them in their own names, and where, by the laws of the state, such securities were so taken and held, they were there subject to taxation in the hands of the agents, such securities were not personal estate within this state, within the meaning of the statute in relation to taxation, and were not liable to taxation in this state, and therefore the assessment was erroneous.

In the case of *Senour, Treasurer,* v. *Ruth,* 140 Ind., 318, 39

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Brief for appellee.

N. E., 946, the supreme court of Indiana held that credits in favor of a nonresident, which are debits against citizens of this state, such credits resulting from loans evidenced by promissory notes held by such nonresidents in another state, and secured by mortgages on real estate in this state, are not within the jurisdiction of the state, nor subject to taxation here; that, the property not being within the jurisdiction of this state, the county board of review had no power to assess it, and, the board's act in that regard being void, it was subject to collateral attack. In the case of *Herron, Treasurer,* v. *Keeran,* 59 Ind., 472, 26 Am. Rep., 87, the supreme court of Indiana held that "promissory notes and other choses in action, placed in the hands of an attorney in this state for collection, and municipal bonds, placed temporarily on deposit in a bank in this state, merely for safe-keeping, and belonging to a *bona fide* resident of another state, are not liable for taxation; and such property, belonging to and in the possession of a resident of another state, who is traveling through or temporarily sojourning in this state, are not liable for taxation."

In the case of *Boyd* v. *City of Selma* (Ala.), 11 South., 393, 16 L. R. A., 729, the supreme court of Alabama held that negotiable promissory notes for money loaned are personal property, and that the domicile of the creditor is the situs for the purpose of taxation of negotiable promissory notes given for money loaned. In the report of this case the editor has added very valuable notes, referring to a great many decisions upon this proposition, and the court's attention is especially directed to this case and also the notes thereunder.

In the case of *Kingman County* v. *Leonard,* 46 Pac., 960, 34 L. R. A., 810, it was attempted to assess for taxation judgments rendered by the courts of Kansas in favor of and owned by citizens of other states, and it was decided that the situs of the debt is the residence of the owner, and that it is not taxable in any other place.

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Brief for appellee.

The supreme court of Michigan, in *Village of Howell* v. *Gordon,* 86 N. W., 1042, has decided the same proposition.

The case on appeal from the chancery court of Copiah county proceeds upon the theory that the appellee has an interest in the real estate itself upon which the mortgage rests, and that this interest can be subjected to the payment of the taxes by an equitable proceeding. We submit that this bill has been filed upon an erroneous view of the law of Mississippi relative to mortgages. The condition of the law in Mississippi is so admirably stated in 1 Jones on Mortgages (4th ed.), sec. 38, that I quote the whole section: "In Mississippi, upon a breach of the condition of the mortgage, the legal title becomes absolute in the mortgagee, who thereupon becomes entitled to the possession of the property as an incident of the title (citing *Hill* v. *Robertson,* 24 Miss., 368, and *Harmon* v. *Short,* 8 Smedes & M., 433). The code now provides that, before a sale under a mortgage or deed of trust, the mortgage or grantor shall be deemed the owner of the legal title of the property conveyed, except as against the mortgagee and his assigns, or the trustee after breach of the condition of the mortgage or deed (citing Code 1880, sec. 1204; *Carpenter* v. *Bowen,* 42 Miss., 28; sec. 1204 of the Code of 1880 is sec. 2449 of the Code of 1892). The debt is considered as the principal and the mortgage as an incident only. The mortgagee, notwithstanding the form of the conveyance, has but a security. The principles long established in chancery have under the code become naturalized in the courts of common law, so that, under foreclosure, the mortgagee is regarded as having a chattel interest only. Even after the mortgagee has taken possession, the mortgaged real estate is regarded as a pledge only (citing *Buckley* v. *Daley,* 45 Miss., 338, 345). As respects third persons, and the mortgagee, also, until after the forfeiture, the mortgagor is the owner of the legal estate, and the mortgagee has only a security for the debt. 'The legal title,' says Chief Justice

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Brief for appellee.

Simrall in a recent case (citing *Buck* v. *Payne,* 52 Miss., 271), 'may be asserted by the mortgagee, but only for the protection of his debt, and to make the security available for its payment.'" This is settled law in the state of Mississippi, and how the appellant could hope, by chancery proceedings, to reach anything tangible, is certainly shrouded in great doubt.

Third. The third proposition is that if the state of Mississippi had attempted, by legislative enactment, to tax notes, mortgages, and other credits owned by nonresidents of the state, such legislation would be contrary to the provisions of the constitution of the United States, as depriving the defendants of their property without due process of law. This question has been settled by the supreme court of the United States in the case of *Railroad* v. *Pennsylvania,* 15 Wall., 300, 21 L. Ed., 179, known as the *"State Tax on Foreign-Held Bonds,"* and that the court has held, where the officer of the railroad company was required to retain and pay to the state of Pennsylvania a certain tax or assessment levied on the interest accruing on bonds held by nonresidents, that it was an interference on the part of the state with the contract rights between the railroad company and its bondholders, and that it impaired the obligation of the contract, and was unconstitutional and void. The same question was raised in the case of *Erie R. R. Co.* v. *Pennsylvania,* 153 U. S., 168, and the supreme court reaffirmed the doctrine in *State Tax on Foreign-Held Bonds,* in 15 Wall., 300, 21 L. Ed., 179. In the case of *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174, the supreme court of the United States has again passed upon this question under the Louisiana statute, and has again reaffirmed the doctrine herein contended for by the defendant. There is a collection of cases in this opinion to which Justice Brewer refers, and it would seem that a sufficient citation to these cases, with authorities therein discussed, is entirely sufficient to cover all of the propositions raised in this case.

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Brief for appellee.

We respectfully submit that the decision in both of the above-entitled causes, of the inferior court, should be affirmed.

Smith, Hirsh & Landau, for appellee.

We have clients interested in the solution of the questions involved in this suit, and have been kindly permitted by the counsel for the defendant to file a brief, and for that reason, among others, we will make it brief. The amount claimed in this case, $163.25, based upon a levy of 13 mills for the county and state, is comparatively insignificant; but the principle involved affects transactions aggregating millions of dollars, and upon the decision, we respectfully submit, depends the credit, the good faith, and the fair name of this state. If this suit can be maintained, then the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, will be overruled, and a large proportion of the money loaned in this state, upon the faith of said case, could be subjected to proceedings for confiscation in the guise of taxation. Every dollar the commission merchant in Memphis or New Orleans loaned to a struggling farmer to enable him to make a crop, every dollar that some nonresident widow or orphan sent here to be invested in mortgages at low rate of interest, every dollar that a nonresident mortgage company has loaned here in good faith, would be liable to a similar tax, and the credit of the people of this state, as well as of the state herself, would be practically extinguished. And for what purpose? Simply to impose upon the borrower additional burdens; for ultimately the borrower must pay a large proportion of the tax upon money. If a nonresident enters into a contract with the state of Mississippi for the building of a public structure, and it is known in advance that the capital employed by him is to be taxed, the people of Mississippi must, after all, really pay it. And so, if an individual contracts for a loan of money, the lender will base the rate of interest upon the tax chargeable thereon, so that any plan providing that

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money must pay its just proportion of the taxes, when it becomes visible and amenable to taxation, will not be found, as a rule, feasible in its execution.

There are certain unwritten laws that neither legislatures nor courts can thwart or repeal. Money not loaned, in the pockets of the owner, cannot ordinarily be reached by the assessor or collector, and when it emerges into daylight, and has assumed a concrete, taxable form, the man who gets it temporarily, and upon the condition to return it, not only pays the lender for its use, but the state, which is possibly seeking to relieve him from a part of the burden of taxation, by reposing responsibility upon the owner of the money loaned, fails in its purpose. It is a trite saying that "prohibition don't prohibit," and it may also be said, in the light of experience, that "money can't be successfully taxed, so as to reach the owner or lender." In fact, in all finite undertakings, there is seldom good without evil; but it also follows that there is rarely evil without good. If a failure to pay the full amount of taxes for which a person is liable entitles him to be designated and denounced as a "tax-dodger," who can escape? It is almost a question of who can cast the first stone. The courts must, of course, enforce the law as it is written, but they cannot accomplish the impossible; and we offer these suggestions to show that there can be no perfect system of taxation devised by human minds, as carried into practice by human exertion. If a local money lender will hide his earnings, and no longer make it available for commercial uses, and the nonresident capitalist will be driven from our borders by discriminating or unjust taxation, how can we expect the state to thrive or prosper? It must be admitted that any tax levied upon money at its face value is discriminating, when the real estate, and such personal property as mules and horses, are based upon an assessment of perhaps one-half, or 60 per cent, of its value, as is a matter of common knowledge. Some of the language of the court in *San Francisco* v. *Mackey*

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Brief for appellee.

(C. C.), 21 Fed., 539, is pertinent here: "The obvious tendency of discrimination, ... and double, unequal, and unjust taxation, ... is to drive our citizens, having a large amount of personal property, out of the state to escape that kind of oppression. . . . . A policy that recognizes the principle stated (in the opinion) cannot fail to be inimical to the best interests of the state, and to discourage investments by both resident and nonresident capitalists, thereby greatly retarding the future development of its resources."

But a leading, and, we submit, a controlling, consideration is the fact that a large proportion of the money loaned in this state was invested here with the assurance and belief that, by virtue of the principle announced in *State* v. *Smith, supra,* an immunity from taxation would be enjoyed. We think it proper to state here that, prior to the rendition of the opinion in *State* v. *Smith,* an organization engaged in the business of loaning money on mortgage, before entering this state, applied to the renowned jurist, the late Chief Justice James Z. George, for his opinion concerning the taxability of nonresidents for money loaned in this state. General George, in an elaborate opinion, dated Jackson, April 26, 1887, held that money loaned in this state by such a nonresident mortgage company was not taxable. We append herewith a copy of certain portions of said opinion, and make the same a part of this brief. His opinion sounds like prophecy, when we read the decision of this court rendered three years later, at the October term, 1890, in *State of Mississippi* v. *Smith,* 68 Miss., 79, 8 South., 294, wherein it was held: "Section 497 of the Code of 1880, which provides for the assessment and taxation of money loaned or employed in this state, applies only where the person owning the same, and sought to be taxed therefor, resides or has a place of business or a location or an agent within the state, but not to a loan to a person in the state by a nonresident, who has no place of business, location, or agent in this state, that is secured by a mortgage on property

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Brief for appellee.

within this state." When this decision was rendered, sections 496 and 481, Code 1880, precisely the same as sections 3751 and 3761, Code 1902, were in force. And this ought to settle the whole question; and one is inclined to marvel at the industry and ability that seeks now to again overthrow or repeal the law of this state, as thus construed, which is just and equitable, and which has been acted upon in good faith many years. The *Smith Case* decided unequivocally and without ambiguity that the mortgage or the interest on a mortgage in this state of a non-resident mortgagee is not taxable in this state. There has been no change in the law; and as to all past transactions, we submit, under the decisions of the supreme court of the United States, there can be now no departure from the principle or rule therein pronounced and maintained.

We have not had an opportunity to hear the argument or read the brief of the opposing counsel, but we presume that they are now placing some reliance upon recent cases of the supreme court of the United States. The case of *Savings & Loan Co.* v. *Multnomah County,* 169 U. S., 421, 18 Sup. Ct., 392, 42 L. Ed., 803, does not touch the question here involved, and, if it had any effect at all, we submit, inferentially would be an authority in favor of the appellee. The court held "that the statute of Oregon of October 26, 1882, taxing mortgages of land in that state to the mortgagees in the county where the land lies, does not, as applied to mortgages owned by citizens of other states, and in their possession outside of the state of Oregon, contravene the fourteenth amendment of the constitution of the United States." Justice Gray said, referring to *State* v. *Smith,* 68 Miss., 79, 8 South., 294, and other cases, that in these cases "there was no statute expressly taxing mortgages at the situs of the land"; and we submit there is no statute in this state expressly taxing mortgages where the land is situated, or elsewhere. It will be noted that he says: "The statute of Oregon, the constitutionality of which is now drawn in ques-

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Brief for appellee.

tion, expressly forbids any taxation on the promissory note, or other instrument or writing, which is the evidence of the debt secured by the mortgage, and with equal distinctness provides for the taxation as real estate of the mortgage interest in the land." In this state the rule is exactly the converse. It is the debt which is taxable, and the mortgage is simply an incident thereto. In *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed., 174, an act of the state of Louisiana was involved. "Section 7 of chapter 106, p. 124, of the Louisiana statutes of 1890, after declaring 'that it is made the duty of the tax assessors throughout the state to place upon the assessment list all property subject to taxation,' contained the following provision: 'This shall apply with equal force to any person or persons representing in this state business interests that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either through himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent, or representative.' The defendant in error, who was domiciled in the city of New York, was the owner of credits which were evidenced by notes largely secured by mortgages on real estate in New Orleans, in possession of an agent of the defendant in error, who collected the interest and principal as it became due, and deposited the same in a bank in New Orleans to her credit. Held, that under the act of 1890, as interpreted by the supreme court of the state, this property in the hands of the agent was subject to taxation in New Orleans, and that such taxation did not infringe any right secured by the federal constitution. The rule in such case is that the federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property

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Brief for appellee.

beyond the scope of the statute, and exempt from taxation, unless it is clear that such is the fact. It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner — are subject to levy or sale on execution, and to seizure and delivery under replevin. Notes and mortgages are of the same nature."

Manifestly that case is radically different from the one at bar. The plaintiff, though a nonresident, "was the owner of credits which were evidenced by notes, largely secured by mortgage on real estate in New Orleans, and these notes and mortgages were in the city of New Orleans, in possession of her agent, who collected the interest and principal as it became due, and deposited the same in a bank in New Orleans to her credit." In the *Stemple Case,* therefore, the property was practically loaned and invested in the city of New Orleans, and the owner had acquired a residence there by reason of the fact that she had an agent there, who handled and controlled and invested the money just the same as she would or could. And therefore, for all practical intents and purposes, the principal was practically a resident of New Orleans, so far as her liability to taxation is concerned, and her property taxed was tangible, and was situate in New Orleans. The same principle is announced in *Bristol* v. *Washington County,* 177 U. S., 133, 20 Sup. Ct., 585, 44 L. Ed., 701, where the court held: "The personal property of a citizen of and resident of one state, invested in bonds and mortgages in another state, is subject to taxation in the latter state; and the amount of the tax is a claim against the property of the person taxed, which is a debt that may, in case of the death of the person taxed, be proved against his estate in the state where the mortgages and loans are contracted, subject to the statutes of limitations of the state." In the *Bristol Case* the court found, as a matter of fact, that "business of loaning money through the agency in Minnesota was con-

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Brief for appellee.

tinued through all these years just as it had been carried on before," and Mrs. Bristol, whose estate had been taxed, was bound to know that under previous decisions of the supreme court of Minnesota property held, managed, and controlled as her property was managed and controlled was liable to taxation in Minnesota. And it would be as difficult to understand how a person who is doing business in one state through an agent, knowing that the law of that state, as construed by its highest courts, made property employed in such state taxable, could thereafter escape taxation, as, it is now understood, how this court can be asked to deliberately repudiate and denounce a decision which has been relied upon for over a decade. It is clear, from the language used in the *Stemple Case,* that if the state court had held the property in controversy exempt from taxation, the federal court would have adopted the construction placed upon the statutes by that state court, and in fact could not, without overruling all of its previous decisions on the subject, have done otherwise. If a mortgage, without being so declared by statute, is an interest in land separate and apart from the debt thereby secured, then it will follow that the land is taxable, the mortgage is taxable, and the debt secured by the mortgage is taxable, and we thus have triple taxation, and then the burden of taxation, already oppressive, will be unbearable.

If the contention of appellant is correct, then mortgages upon railroads are taxable, mortgages on cotton factories and other manufacturing establishments are taxable, and, if such a principle is enforced, then practically all public improvements in this state will terminate, for railroads and manufactories cannot be built if such taxation is permissible. If the residence of debtor is the absolute test in determining the situs for taxation, then all debts due by any person in this state to nonresidents for money borrowed, goods purchased, or for any other reason, are taxable here, and all interstate commerce must cease. If the residence of the debtor determines the situs for

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Brief for appellee.

taxation, then what becomes of the doctrine that the debt, without reference to ownership, must pay the tax, and can be sold for that purpose? If the views of the appellant can be maintained, then it seems to us it may be likely that there will soon be but few available debts or recorded mortgages belonging to residents or nonresidents to be taxed in this state. To paraphrase the language of this court in *Adams* v. *Tombigbee Mills,* 78 Miss., 693, 29 South., 470: "Individuals and corporations would distrust as to the future if (a decision like *State* v. *Smith,* 68 Miss., 79, 8 South., 294, carefully considered, construing) the general law (and which law was re-enacted after the rendition of said decision), and on the faith of which appellee has invested its money, should be" overruled, and rights of property should be thus destroyed, which, of course, cannot be done under the constitution of the state of Mississippi and under the constitution of the United States. We also submit that this court could not, without violating certain provisions of the federal constitution and of the constitution of this state, hold liable for taxation nonresident taxpayers, who sent money into the state to be loaned under the faith of the decision in *State* v. *Smith, supra.* So far as the federal points are concerned, we refer to *City Railway Company* v. *Citizens' Street Railroad,* 166 U. S., 557, and the familiar case of *Illinois Central Railroad Company* v. *Adams,* 180 U. S., 28, 21 Sup. Ct., 251, 45 L. Ed., 410.

The following is the opinion of the late Chief Justice George, above referred to:

Taxation of Nonresidents.— I am asked: "How and to what extent will section 497 of the Revised Code of Mississippi of 1880 affect such loans made in the state of Mississippi?" And the request is made to have the question discussed in all its bearings in a written opinion for the guidance of the company. "Every person, resident or nonresident, whether corporate or otherwise, and the agent of such nonresident, having money

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Brief for appellee.

loaned at interest in this state, or employed in the purchase or discount of bonds, notes, bills, checks, or other securities for money, or employed in any kind of trade or business, shall be taxable for the same in the county where such person may reside or have a place of business, or be temporarily located, at the time of the assessment; and if any such person shall fail or refuse to give in such money on oath, or if the assessor shall have cause to believe that such person has not rendered a true account of all such money, he shall assess to such person such an amount as he shall have reason to believe correct, according to the best information he can procure," etc. The section then proceeds to make provision to secure a return to the assessor of the amount of money so loaned or employed in business, and to impose penalties enforceable by civil suit for failure to make proper return. The state constitution provided, in section 20, article 12, that: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Said section 497 is a part of the chapter in the code regulating the assessment and collection of all state or county taxes, and providing, also, for the imposition of taxes on certain kinds of business, for the carrying on of which licenses are required. These are called "privilege taxes," and they are imposed on a great number of callings, trades, etc., among which are merchandising, selling by auction, peddling, cotton brokers, coal yards, inns and taverns, boarding houses, photograph galleries, transient venders of horses or mules, banks of deposit and of discount, insurance agents, real estate agents, etc. Section 481, being a part of the same chapter, provides for a list of his taxable property, to be made out by each taxpayer, with the valuation of each item. This is done in pursuance of the section of the constitution before quoted, so that taxes should be levied on "all property" according to its value, to be ascertained according to law. In this list are the following (among

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Brief for appellee.

other) items: "Amount of capital employed in merchandise or manufacturing. Amount of money on hand, or on deposit, or loaned. Amount of indebtedness to the party assessed, which he regards as probably collectible. Amount of all other personal property not otherwise estimated." A uniform tax is imposed on all property so valued and assessed, as the constitution requires. Taxes on business, or privilege taxes, not being taxes on property, are levied in the discretion of the legislature; the amount of tax in each case being specified in the chapter thus: "On each hotel or tavern, ... $40." The above seems to be all of the state statutes on taxation necessary to be considered in examining said section 497. Before proceeding to consider the statute, it is well to set forth the general principles on which the power of taxation is to be regulated, so far as relates to nonresidents of the state imposing taxes.

In the case of *State Tax on Foreign-Held Bonds,* 15 Wall., on page 319, 21 L. Ed., 179, the supreme court of the United States says: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. . . . . It is not possible to conceive of any other (subject), although, as applied to them, the taxation may be in a variety of ways. . . . . Unless restrained by the federal constitution, the power of the state as to the mode, form, or extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. . . . . To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in the debts of corporations (or of any debtors) belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." Again, on pages 323, 324, 15 Wall., 21 L. Ed., 179, the court says: "It is undoubtedly true that the actual situs of personal property

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Brief for appellee.

which has a visible or tangible existence, and not the domicile of the owner, will in many instances determine the state in which it may be taxed. The same thing is true of public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former by general usage have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner. The latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly none when the instruments, as in the present case, constituting the evidence of the debt, are not separated from the possession of the owner." And on this reasoning the supreme court of the United States decided a tax levied by the state of Pennsylvania on a debt created and due by a railroad company in that state to a foreign creditor was beyond the power of the state to tax, though secured by a mortgage on real estate in that state.

The same court, in *Kirtland* v. *Hotchkiss*, 100 U. S., 491, 25 L. Ed., 558, affirmed the same principle, and held, also, that a debt held by a citizen of Connecticut, contracted in and secured by mortgage in the state of Illinois, was taxable in and had its situs at the domicile of the owner in Connecticut; stating that the bond (for the debt), wherever actually held or deposited, is only evidence of the debt, and, if destroyed, the debt, the right to demand payment of the money loaned, with stipulated interest, remains. And Judge Cooley, in his work on taxation (pages 14 and 15), says: "But a personal tax cannot be assessed against a nonresident. Neither can the property of a nonresident be taxed, unless it has an actual situs within the state, so as to be under the protection of its laws. The right of a foreign creditor to secure from his debtors within the state the payment of his demand cannot be subjected to taxation within the state. It is a right that is personal to the

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creditor, where he resides, and the place of business of his debtor is immaterial." Burroughs takes the same view. See his work on taxation, p. 41. The supreme court of Mississippi, in *Horne* v. *Green,* 52 Miss., 454, affirmed the same principle, in holding that a debt due a citizen of Mississippi by a nonresident was taxable here, saying that the situs of the debt follows the domicile of the owner, and consequently is taxable in this state. There seems to be no doubt of the correctness of this principle. In the light of this, I will proceed to examine section 497.

The first observation to be made in reference to this section is that it provides solely for a tax on property, and in no way relates to the taxation of business, or of "privileges," as they are called, all of which last are provided for in subsequent sections of the same act, commencing at section 585. The taxation which section 497 provides for is a taxation on valuation of property — a certain percentum on the dollar's worth. This is so clear and manifest that argument in support of it is not needed. I now proceed to consider the meaning of section 497, and its legal effect, conceding it to be constitutional. It proposes to tax all exactly alike, whether "resident or nonresident," having money loaned at interest in this state or employed in any kind of business here. This section is singularly inaccurate, not to say absurd, if construed according to its literal meaning; for it will be noted that it taxes "money loaned," and not the debt created by the act of lending or the security therefor. This inaccuracy exists, also, in section 481, before partially set out, where the taxpayer is required to return in one item the amount of money he has "on hand, on deposit, or loaned," for taxation on the amount so stated, and in another distinct item he is required to return, in addition, "the amount of indebtedness due to him which he regards as probably collectible," also for taxation. Both of these provisions seem to proceed on the idea that "money loaned,"

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Brief for appellee.

exactly as "money on hand or on (special) deposit," remains the property of the lender. And this view is strengthened by the provision, before quoted, that, in addition to the taxation of money loaned, the party is also taxed on the value of all the "indebtedness due him which is probably collectible." Under this view, the "money loaned" is treated as a bailment of the kind called "commodatum" in the civil law, where the thing lent remains the property of the lender, and is to be returned, if it be money, in the identical bills and coins lent. Probably a lending of money in that way was never seriously and in good faith made. I never heard of but one such transaction, and that was when, during our "flush times" in 1837, the same kegs of silver, after being examined by the state examiners in one bank and counted as a part of its assets, were transported to another bank, to be there examined and counted as the property of that bank, and so through the whole number, and finally, after performing their office of deceiving the examiners, were returned to the owner. Certainly that is not the way in which money is loaned in this day. There is nothing of the idea of a bailment in the lending of money at interest. If lent without interest or reward or hire, it might be a bailment called a "mutum"; but in that kind of a bailment the title to and property of the thing lent passes to the borrower. So that "money loaned" is always the property of the borrower, and, if taxable at all as money, must be taxed against him. No person can be taxed for the property of another, when he stands in no fiduciary relation to it; and, if he does, he is treated as, and is in law, the owner. If this be the meaning of the statute, it is unconstitutional, for the reason just stated — *i. e.*, that it attempts to tax one person, the lender, for the property of another, the borrower. But we are not to attribute a meaning to a statute which would make it absurd or unconstitutional, if any other is possible. So we must conclude that the statute means to tax the property of the lender, which is, and can only

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Brief for appellee.

be, the debt due him for the money he has loaned to the borrower.

Having reached this conclusion, we next inquire whether the meaning of the statute is that all debts due by debtors in this state to nonresident creditors, where the consideration is money loaned, whether the transaction of lending took place in this state or outside of it, are to be taxed. This seems to be the meaning of the language. We have already shown that the tax is not on "money loaned," but on the debt due by the borrower of the money. That being so, it follows that the phrase in the statute, "having money loaned at interest in this state," means exactly, and no more or less than, "having a debt due by a debtor in this state on account of money lent." Under that heading the taxation would be on all nonresidents who had debts due by debtors residing in Mississippi, whenever and wherever such debts were created, if only they were for money loaned. If we limit, as to nonresidents, the meaning of the statute, so as to embrace only debts created by a lending in this state, then we must make the same limitations as to residents; for the language is the same—not similar only, but identical—as applied to both, viz.: "Every person, resident or nonresident, ... having money loaned in this state." Under this limited meaning, we would have a statute raising revenue for the state which exempted its citizens from taxation on debts created for loaned money, where the citizens would go out of the state to make their loans, but taxing them when the transaction of lending took place in this state. So absurd a result is not to be attributed in a statute; and no state is to be presumed to offer a premium for its citizens to go out of the state to transact a business entirely legitimate, and even favored by the laws and policy of the state. It is thus shown that the true meaning of the statute is to tax all debts due by citizens and residents of this state to nonresidents, when the consideration is "for money loaned," whenever and wherever contracted, whether contracted in the

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Brief for appellee.

state or outside of it, and beyond the power of the state, as has been shown.

But it may be insisted that, to avoid this conclusion, the meaning of the statute can be restrained, so as to embrace only loans made in the state. I deny, if such restriction would make the statute constitutional, it would be allowable. When the language of the statute is plain, and not subject to doubt, its unconstitutional effect in its true reading cannot be evaded by limiting its language and making the statute mean different from what was plainly intended by the legislature. The legislature has determined to tax all these debts alike, whether contracted within the state or out of it, and to put the lenders in both cases on the same footing; and we cannot change this by giving to the statute an effect which would work inequality. We cannot say that the legislature would enact the law at all, unless it would have effect as they intended it. See *U. S.* v. *Reese,* 92 U. S., 220, 221, 23 L. Ed., 563. But, suppose we construe the statute to mean only that debts due by citizens of the state for money loaned in the state are taxable; this does not help the matter as to debts due to nonresidents. It must be noted that the statute imposes taxes, or attempts to impose taxes, on property, and not on business. It taxes property, and property alone. The debt thus taxed is the property of the nonresident. Its situs is the domicile of the nonresident. It is taxable there, and nowhere else. It makes no difference when personal property was created or acquired; for, being removable, it may and often is, carried, in this commercial age, to a different jurisdiction, and it is taxable only in the place of its locality. The place of its origin has nothing to do with its taxability. This is determined alone by its situs. As above remarked, the situs is the domicile of the owner. See *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 21 L. Ed., 179. So, under that construction, section 497 is unconstitutional in

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attempting to impose taxes on property outside of the state. This would seem to end the case.

But, as I am requested to discuss the question in all its bearings, I proceed to notice some other views which possibly may be taken. It may be argued, in order to escape the unconstitutionality charged, that the true meaning of the statute is that any person, resident or nonresident, having money in this state, which he afterwards loans in this state to a resident herein, shall be taxable. This is manifestly not the meaning of the statute, as has been shown. But, in addition to that, such a construction would exempt all residents from the tax, if only they kept their money out of the state and then loaned it. Such an intention should not be attributed to the legislature, unless plainly expressed; and I have shown the plain meaning is not that. But suppose, after all, this is the meaning to be adopted. On this construction I submit the following:

First. It is undoubtedly in the power of the state to tax money actually in its borders. Money, including gold and silver, and even bank bills, has its situs where it happens to be, and is subject to the jurisdiction of that place. Mississippi may tax money in its jurisdiction belonging to nonresidents, where not merely in transitu, but engaged in business here. But this is subject to the following qualifications and limitations: Treasury notes of the United States are not taxable at all by any state, nor are national bank notes. So that money in either treasury notes or bank notes, if within the state as property of a nonresident, it is not taxable in that form; and, if he loans them, then a debt is created due to a nonresident, and that, as has been shown, is not taxable. The transaction would be such that, the instant he ceases to be the owner of that kind of money, which is not taxable in its nature, he becomes the owner of a debt, which is not taxable except in the place of his residence. If the company brings this kind of money here, and lends it, the company is not liable to taxation, either for

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being the owner of the money, or for the debts created by lending it. It could only be taxable for the transaction of converting the money into the debt, and, as we have seen, the statute does not attempt to tax that.

Second. If the money brought here were gold and silver, and it were loaned for five or ten years, then the tax could only be levied once, viz.: on the money and in that place. For the subsequent years there would be no money, but only the choses in action — debts belonging to a nonresident.

Third. It would be necessary to taxation, even in the last case, that the money, the gold and silver, should have an actual situs in Mississippi as the property of the nonresident before he could be taxed. It is only taxable here because of a transfer here, and its consequent subjection to the laws, and jurisdiction of the state, and the right of its owner to claim protection for it from the state against theft and robbery here. It therefore follows that if a nonresident lend money to a citizen of a state, and should deliver it to him outside of it, or should give a check or draft for it, payable in another state, there could be no taxation of the nonresident on that. The money could not be taxed, because it was not in the state; and the check or draft, though drawn in the state, could not be taxed, because it is not the property of the nonresident, but is only a debt due by him. It would only be property of the borrower. It might be taxed in the hands of the latter as his property, just as the money realized from it might be taxed when brought into the state by him or by any person to whom he may have paid it. But with this sort of taxation your company has no concern, and, besides, such taxation is not provided for in the section we are considering.

So far our way is clear and plain. I consider now the subsequent clauses of the section, "having money employed in the purchase or discount of bonds, notes, checks, or other securities for money, or employed in any kind of trade or business."

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Brief for appellee.

This part of the section evidently refers to the case of money in the business referred to and carried on in the state. This refers to the capital stock of money so employed. This capital is supposed to consist of a certain amount of money used in the state, which may be from time to time invested and collected, and invested and collected again. This operation may take place many times in the year, going out from and returning to the owner from day to day, or week to week. So the tax is levied on the money, capital so employed, and not on its proceeds — all checks, bills, etc. The clause under consideration, therefore, clearly means a taxation of the money, and implies necessarily that the money so taxed shall be subject to and within the jurisdiction of the state, and, of course, according to the principles heretofore established, would be taxable because its situs is here.

This might be sufficient to answer the inquiries propounded; but, in view of the fact that the company proposes to loan money here, it may be well to present the following considerations:

First. Your company, being a corporation, has no right to do business here, except by permission of the state, which permission is presumed, unless there be some statutes to the contrary. But neither this statute, nor any, shows any intention to prohibit such business.

Second. It is true that the state has the power to prescribe the terms and conditions on which alone your company can do business here, and can tax that business in its discretion. But the right has not been exercised, and no tax has been levied on the business. This has been heretofore fully shown. The state, so far as your company is concerned, undertakes to exercise a power it does not possess. That, therefore, fails. This failure does not give to the executive and fiscal officers of the state the power to levy other tributes upon you entirely different from the taxation attempted by the legislature. I will notice some authorities, which under certain circumstances hold that

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debts to nonresidents are taxable in the state where the debtor lives. These are collected and referred to in Burroughs on Taxation, section 42. In the *Vermont Case,* the money was sent to the state, and placed in the hands of an agent resident there, who collected it and reloaned it as a permanent business. In that case, both the money first loaned and the proceeds of the loans, when collected, were kept in Vermont and reinvested. The securities of the money were also kept there. In the *New York Case,* the securities for the money lent were kept in New York, and so in the *Illinois* and *Kansas Cases.* In the *North Carolina Case,* the case applied to tangible personal property; was a fiction, not applicable to revenue and taxation. All these the court holding that the doctrine of situs for personal property cases, even if they are good law to the extent laid down in some of them, which I deny, are based on the idea that the security for the debt is within the jurisdiction of the state; the security being but the mere evidence of the debt, as was seen in *Kirtland* v. *Hotchkiss,* 100 U. S., 491, 25 L. Ed., 558, but not the debt itself, that being but the personal right of the debtor to demand payment. In Mississippi, in *Johnson* v. *Rascoe,* 62 Miss., 703, a decision has been made which ought to be noticed. There, for the purpose of distributing a dead person's estate, hotels and money actually in the state were subjected to the laws of the state. It will be noted (1) that the money loaned was always in the state; that it was loaned here, collected, and reloaned by an agent, who took the notes payable to the nonresident or his agent; that, for the purpose of distribution, the fund being in the possession of a Mississippi court, the court held it subject to our laws. It will be noticed, as to all these cases, they were state decisions; and the case of the *Foreign-Held Bonds,* 15 Wall., 300, 21 L. Ed., 179, was also a state decision, and was reversed by the supreme court of the United States.

I have gone into the details in the argument beyond what is

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ordinarily required in the mere giving of an opinion as professional advice. But as my opinion was asked through the counsel of the company, and I was expressly requested to discuss the matter in all its details, I have deemed that I was expected to present the statute in all its various possible aspects, and to give the reasoning on which my conclusions were based. On the whole, I am of the opinion that the company may safely invest their money in real estate mortgages in this state, in the mode and by the instrumentalities approved in the foregoing opinion, without incurring any liability for taxation under our laws. I have made no special reference to the mortgage as a security for the loans, since it was well settled here that the mortgage is a mere security for the debt, and therefore makes no change in the rules I have laid down. Of course, the land mortgaged would be liable to taxation according to its value in the hands of the mortgagor; and, on his default in payment thereof, the company would be bound to advance the money to pay the taxes. But this obligation is only to itself, to protect its own interest, and could not be enforced against it by the state.

Argued orally by *D. A. Scott,* for appellant, and *Edward Mayes,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

One of these cases is here from the circuit court of Coahoma county; the other from the chancery court of Copiah county. The one from Copiah county presents the question whether the interest of a mortgagee is such an interest in the land itself, covered by the mortgage, as renders it liable to taxation. The one from Coahoma county presents the question whether the notes and mortgages, as "solvent credits," have a "business situs" in that county. There is a distinct line of decisions holding with our case (*Jahier* v. *Rascoe,* 62 Miss.,

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699) that wherever a money lender has a local agent in another state, and permits that agent to control the evidences of debt, and the mortgages securing them, and to continue, for a long course of dealing, the business of lending, collecting, and relending money in the state of the agent's residence, such evidences of debt, and the mortgages securing them, have what has come to be known as a "business situs" for purposes of taxation and for other purposes. This principle is thus expressed in *Jahier* v. *Rascoe:* "Wherever it appears that the debt arose as an incident to a business conducted in this state," etc. However phrased, the principle is this: That wherever the money of a lender in one state is by the principal intrusted to the control of an agent in another state for the purpose of being kept in the latter state, and loaned out, collected, and reloaned, or habitually kept on deposit, for safety merely, as held in *Re Romaine* (N. Y.), 27 N. E., 759, 12 L. R. A., at page 408, so as thus to remain, through a course of dealing, so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquires what is known as a "business situs" for the purpose of taxation, as well as for certain other purposes not necessary to be dealt with here.

The statement of facts in the Coahoma county case does not contain any stipulation that Mr. Glover was the agent of the appellee. But the facts as to his agency are practically the same with those as to the agency of Powell in the *Smith Case,* 68 Miss., 79, 8 South., 294, and it was there held, rightly or wrongly, that Powell was not the agent of the lender. The lender (the appellee) has its place of residence in England. It has a local agency in Memphis, Tenn.; but it is expressly agreed that it has no office or place of business in this state. The agreement does not set out that Mr. Glover secured all the loans. On the contrary, it was expressly agreed that loans were secured by other attorneys than Mr. Glover, and sometimes by the borrowers direct. It is further agreed that the notes and

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Opinion of the court.

the trust deeds were prepared by the appellee in Memphis, and forwarded to the applicant or his attorney for execution, and that the securities, when signed and acknowledged by the borrower, were delivered to his attorney, with the understanding that he was to transmit them to the appellee's office in Memphis. It is further agreed that the trust deeds and notes are immediately sent, after the contracts are consummated, to the appellee's home office in Hull, England, where they remain until they mature, when they are returned to the agent of the appellee at Memphis for collection. It is further agreed that David Houghton, the trustee in all the instruments involved, is a resident of Hull, England. It is further agreed that the applications sent to Mr. Glover were sent at his request, and that they would be sent to any one who would desire to make use of them, and that some of these very loans were made upon applications that came from other attorneys or from the borrowers direct. The agreed statement (which the reporter will set out in full) further expressly provides that this case "is to be tried in all the courts to which the same may come, by appeal or otherwise, upon the facts set out in the agreement, and none other."

We think on this statement of facts we are concluded by the case of *State* v. *Smith,* 68 Miss., 79, 8 South., 294, as to the Coahoma county case. This court said in that case: "There can be no doubt that, where an agency is created in this state for the loaning of money, and the business of loaning it is carried on here — this state being the locality in which the transaction is begun and completed — and the debt acquires a situs here, from the course of dealing between lender and borrower, through the agency established here, it is taxable; but where the nonresident lender has no place of business or location or agent in this state, and accomplishes the loan beyond the limits of the state, the fact that negotiations for the loan were made by persons in this state, and it was secured by mortgage on property in this state, does not subject it to taxation here.

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Opinion of the court.

In the case before us the creditor has no agent in this state, and no place of business here. The money was not sent here to be loaned. The evidence of debt was not here. The business of lending was not conducted in this state. The debt was secured by a mortgage on property in this state, and the loan was obtained by the application of persons in the state transmitted to persons beyond its limits, who forwarded the money from without the state. It was not embraced by section 497 of the Code of 1880."

The section of the Code of 1892, under which this tax is sought to be imposed, is the same with section 497 of the Code of 1880. *State* v. *Smith, supra,* is conclusive of this Coahoma county case. It has been too long recognized as the law, and business investments have been too long made upon the faith of it, to permit it to be questioned. The remedy is with the legislature, not with the courts. Counsel for appellant earnestly insist that the clause in the trust deeds, to wit: "The contract embodied in this conveyance and the notes secured hereby shall be construed according to the laws of Mississippi, where the same is made," localizes and domesticates the debts therein, and subjects the same to taxation in this state. The facts show where a contract is made, and the court held in the *Smith Case* that, although the negotiations were concluded in this state, and the contract made, as shown by the facts in that case — substantially identical with the facts here — yet it was not a contract "made" here, and that Powell was the agent of the borrower. As to the last propositions, dealt with in a very summary way in the *Smith Case,* we say nothing; but as to its interpretation of section 497, Code 1880, it seems to us sound. Whether one is an agent depends, not on paper recitals, but on the facts.

We are unable to see any difference between that case and this as to how the business of lending was conducted, and feel bound by that decision. The object of the clause in the con-

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Opinion of the court.

tract that it should be construed according to the laws of Mississippi undoubtedly was to enable this grasping corporation to secure the abnormally high rate of interest allowed in this state, 10 per cent. The point made in the last brief filed for appellant—that the order of the board of supervisors is conclusive—is untenable. The board cannot fix situs by an order; the facts determine situs.

As to the Copiah county case, it has been too long settled in this state to admit of further debate that a mortgagee has no interest or estate in the land mortgaged. *Buckley* v. *Daley,* 45 Miss., 338; *Freeman* v. *Cunningham,* 57 Miss., 67; *Beckett* v. *Dean,* 57 Miss., 232. In *Buckley* v. *Daley, supra,* the court says: "The estate in the land is the same thing as the money due upon it. Under our decisions the extent of the mortgagee's right is to sell the property for the purpose of realizing his debt — a mere right to resort to the security for the payment of the debt. He has no title which is vendible under execution. It is held that, after breach of condition, he may maintain ejectment; but this he can do only as a means to the end of enforcing his security." It is expressly said that "his estate is neither legal nor equitable," and that he has no "interest in the property, or right to it, except as an incident to the chose in action secured by it." These decisions are conclusive in favor of appellee in the case from Copiah county; for the effort in that case is solely to tax the mortgages as if they were land, or, to phrase it a little differently, to tax the mortgagee's interest as real estate. This has not yet been done in this state; on the contrary, the very language of section 3757 in the Code of 1892, "shall be taxable for the same in the county in which such persons may reside, or have a place of business, or be temporarily located at the time of the assessment," indicates clearly that the legislature, in this section, dealt with loans of this sort as following, according to the general rule of law, the person of the creditor, and as being taxable at his domicile. At the

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time of the enactment of this statute the learned commissioners who framed this section, and the legislature which adopted it, must be presumed to have known of the rule announced in the *Smith Case, supra,* and of the maxim or legal fiction, *"Mobilia sequuntur personam,"* which we have referred to, and of the three cases which we have referred to, as to the quality of the mortgagee's interest in the land mortgaged, and hence to have intended, in re-enacting this section in the very words in which it had been enacted in the Code of 1880, sec. 497, and substantially in article 23, p. 76, of the Code of 1857 and in the Code of 1871, sec. 1682, to preserve and perpetuate the rule that loans of this character, unlocalized in this state, are to be taxed to the owner at his domicile. That is the interpretation of this section in the *Smith Case,* and many sessions of the legislature have been held since with no change in the section.

There are other questions in these cases, upon which we desire to remark. First, it is beyond controversy that the interest of a mortgagee in the lands mortgaged, whether it be, as here, a mere right to sell land to pay the debt — a chose in action only — or whether it be, as held by the United States supreme court and many state courts, an actual estate in the lands itself, is in either case a sufficient interest therein, in constitutional law, to empower the legislature to tax it, by express enactment, as an estate in land. This is conclusively settled by the United States supreme court in the *Multnomah County Case,* 169 U. S., 429, 18 Sup. Ct., 392, 42 L. Ed., 803, and in *New Orleans* v. *Stemple,* 175 U. S., 321, 20 Sup. Ct., 110, 44 L. Ed., 174. See, also, *Bristol* v. *Washington County,* 177 U. S., 133, 20 Sup. Ct., 585, 44 L. Ed., 701, and the *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 21 L. Ed., 179; and *Walker* v. *Jack,* 31 C. C. A., 462, 88 Fed., 576, opinion by Judge Taft; and *Howell* v. *Gordon* (Mich.), 86 N. W., 1042; and *Allen, Treasurer,* v. *The Nat. Bank of Camden,* 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517. In

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the *Multnomah County Case,* the United States supreme court thus expresses it: "The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property to be taxed, like other choses in action, to the creditor at his domicile, or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs." The legislature of this state, therefore, has the undoubted power to pass a law subjecting the interest of every mortgagee in land in this state, though a nonresident of the state, to taxation here, legislatively fixing the situs of that interest in this state for the purpose of taxation by this state, which protects the mortgagee, and furnishes him the sole forum for enforcing his claim. And we wish to add, with all the emphasis which we can command, that the next legislature of this state ought to pass just such an act promptly. The record in these cases discloses the great necessity for such legislation. Strong insistence is placed by counsel for appellee on the proposition that it is not good public policy to enact such a law, for the reason that, in the absence of such taxation, the rate of interest will be made less to our people; and yet what are the facts shown by this record? First, that this mortgagee has charged the highest rate of interest allowed by our law — a rate so high as to be rarely allowed anywhere else in the United States; second, whilst doing this, it has not paid the state one cent in the way of taxes. In other words, it has charged the highest rate of interest, and paid no taxes here; and it may be safely assumed, from the history of such organizations, that it will always charge the highest rate of interest allowed by any state, whether it is required to pay any taxes or not. The proposition of counsel, therefore, does

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not fit in with the facts of the case. But this is not all this record shows. It shows, third, that this mortgagee has not only paid no taxes here, whilst charging the highest rate of interest allowed, but has actually put into these mortgages a stipulation (a) that the mortgagor should pay all taxes on the land, and (b) should also pay all taxes which the law of the state might, in the future, compel the mortgagee to pay on the mortgage debt. Surely, the legislature will need no further argument than these three propositions to convince it of the necessity and the propriety of compelling these foreign lenders of money to pay, just as all other citizens pay, their proper share of taxes for the protection afforded them by this state.

It is strongly urged that the *Smith Case*, 68 Miss., 79, 8 South., 294, is "antiquated and obsolete, and in plain conflict with the modern decisions" on the subject of taxation, especially the cases cited from the United States supreme court, relied on. We think the trouble is not so much with that decision — at least as to its interpretation of the statute — as with the statute itself. Originating in 1857, at a time in this state when agriculture was everything, and commercial interests of slight comparative importance, the failure of the legislature to follow the advanced statutes of other states on the subject of choses in action, including mortgage debts, is to be attributed to the conditions, until quite recently obtaining in Mississippi, as to agriculture and commerce.

We have read critically all the cases cited from other state supreme courts and the United States supreme court, and the doctrine of these, the latest cases, on the power and propriety of the legislature's compelling the owners of the mortgage debts and other choses in action to pay taxes on the same in the state where they must be enforced or collected, and, to that end, of giving them all a "business situs" there, or, as to mortgages, of legislatively declaring the interest of the mortgagee to be an estate in the land for the purpose of taxation, and fixing its

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situs in the state where the land lies, is by us most emphatically approved. We quote, to give it our special approval, the following from the masterly opinion of Mr. Justice Holmes in *Blackstone* v. *Miller, supra:* "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we are, nevertheless, subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor, in proper person, to collect the debt? The law of the same place. To test it, suppose New York should turn back the current of its legislation, and extend to debtors the rule still applicable to slander—*'actio personalis moritur cum persona'*—and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone. Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on the debts owned by its citizens than upon the tangible chattels found within the state at the time of death. The maxim, *'Mobilia sequuntur personam,'* has no more truth in the one case than in the other. When logic and policy of the state conflict with a fiction, due to historical tradition, the fiction must give away." And also the following from the able opinion of the Maryland supreme court in *Allen* v. *State Nat. Bank of Camden,* 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517: "Conceding, for the present, that the interest of the mortgagees is in the nature of a chose in action, the general rule that its situs for taxation is the residence of the owner is a mere fiction of law, and yields, whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined,

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and whenever the legislative intent is manifested that this legal fiction should not operate."

We also call special attention to the following well-considered statements of the law, one from the supreme court of Pennsylvania and the other from the court of appeals of New York. Says the former in *Maltby* v. *Reading, Etc.*, 52 Pa., 140: "The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a non-resident as to the resident owner, because civil government is essential to give value to any form of property without regard to ownership, and taxation is indispensable to civil government. . . . It is apparent that the intrinsic and ultimate value of the loan, as an investment, rests on state authority; *i. e.*, the state which made it property, and which preserves it as property. Then it would seem that this kind of property, more than any other, ought to contribute to the support of the state government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creative grant, is so dependent upon the government—it lives and moves and has its being so entirely by the favor of the government—that not only what it owns, but what it owes, is thought fit to be taxed." Says the court of appeals of New York, in *People* v. *Com'rs*, 23 N. Y., 224: "The fiction or maxim, '*Mobilia personam sequuntur,*' is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience or justice so require. In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law.' So, Judge Story, referring to the situs of goods and chattels, observes: 'The general doctrine is not contro-

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verted, and although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing should be examined.' He adds—quite pertinently, I think, to the present question: 'A nation within whose territory any personal property is actually situated has entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there.' I can think of no more just and appropriate exercise of the sovereignty and jurisdiction of a state, or nation, over property situated within it, and protected by its laws, than to compel it to contribute towards the maintenance of the government and law."

It is earnestly insisted that these foreign money lending corporations have many millions of money loaned in this state on mortgages on land, and that they pay no taxes in return for the protection they get from the state whose courts and laws alone make their securities available. This is, beyond all controversy, a great wrong to the people of this state, whether such money lenders be nonresident persons or nonresident corporations. The constitution of the state makes it the duty of the legislature to tax all property not legally exempt; and when the present defect in the law, in this regard, is brought to its attention, it is not to be doubted that the legislature will promptly rectify the situation.

We make a closing observation: The Multnomah County Case is not applicable here because it was in construction of the act of Oregon authorizing such taxation. The case in 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517, has no application for the reason that in that state the statute of 1896 fixed the situs of the mortgagee's interest for taxation in the county where the land was located, and for the further reason that in Maryland the mortgagee's interest is more than a mere lien. And it will be found, upon examination, that the

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other cases cited by learned counsel for plaintiff, in Oregon, in California, in Missouri, in Michigan, in Indiana, in Massachusetts, in New York, and in New Jersey, all depend either upon express statutory or constitutional provision. Indeed, in Missouri, in *Russell* v. *Croy,* 164 Mo., 69, 63 S. W., 849, the supreme court of Missouri actually held the third amendment to the constitution of Missouri adopted in 1890, which was taken literally from the constitution of California to be itself unconstitutional because of its discriminating against corporation mortgages. See, as showing that these cases rest on statutory or constitutional provisions, *Mumford* v. *Sewall,* 11 Or., 67, 4 Pac., 585, 50 Am. Rep., 462; constitution of California adopted in 1879, art. 13, sec. 4; *Common Council* v. *Asessors,* 91 Mich., 78, 51 N. W., 787, 16 L. R. A., 59; *Village of Howell* v. *Gordon,* (Mich.; decided in 1901), 86 N. W., 1042; *Allen* v. *State Nat. Bank of Camden,* 92 Md., 509, 48 Atl., 78, 52 L. R. A., 760, 84 Am. St. Rep., 517; *Ins. Co.* v. *Commonwealth,* 137 Mass., 80; *State* v. *Runyon,* 41 N. J. Law, 98; and *In re Blackstone's Estate* v. *Miller,* 171 N. Y., 682, 64 N. E., 1118; *Blackstone* v. *Miller,* 188 U. S., 203, 23 Sup. Ct., 277, 47 L. Ed. —. This last was a succession tax case, where the tax "was upon the transfer, not upon the deposit," and so not in point.

The case of *New Orleans* v. *Stemple,* 175 U. S., 309, 20 Sup. Ct., 110, 44 L. Ed. 174, will be seen upon proper analysis, to fall within the principle of those cases defining what "a business situs" for the mortgages of this sort is. The supreme court of the United States in that case say, as pointed out by counsel for appellee: "First, that the property in question was clearly property arising from business done in Louisiana, being property of the deceased, a resident of New Orleans; second, that the same had never been out of the state, but that the money was still on deposit in New Orleans banks, and the notes and mortgages were still in New Orleans in the hands of the

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Opinion of the court.

agent of the plaintiff; and, third, that undeniably the moneys were to be kept in the state for reinvestment or other use, and that the credits were in the hands of a local agent for the same purpose;" and all that the court held was that under those circumstances they were taxable under the Louisiana statute, which statute provided, amongst other things, that "all bills receivable, obligations, or credits arising from business done in this state, are hereby declared assessable within this state."

We have given these cases the most painstaking consideration, and our conclusions are: First, that the legislature has the power to fix the situs of a mortgagee's interest in land, whether it be an estate in the land or a mere chose in action in this state for the purpose of taxation, such legislation having been declared in the *Multnomah County Case* "not a deprivation of property without due process of law," and not a denial of "the equal protection of the laws"; second, that the legislature of this state has not yet passed such a statute; and, third, that we commend to the earnest consideration of the legislature, at its next session, the prompt passage of a duplicate of the Oregon law. The provisions of this statute tax the interest of the mortgagee to him as land, and the rest to the mortgagor, thus avoiding double taxation, and, having been upheld by the supreme court of the United States, will be unassailable.

We acknowledge ourselves greatly indebted to the very able briefs of counsel on both sides, and we direct the reporter to set them out in full.

Affirmed.

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Brief for appellant.

PENORA HOLLOMAN ET AL. v. VAN BUREN BULLOCK.

1. PUBLIC LANDS. *Homestead. Heirs of deceased homesteader. Revised Statutes of United States §§ 2291, 2292.*

There is no conflict between sections 2291 and 2292, United States Revised Statutes. The first, section 2291, provides that in case of the death of the person making an entry of public lands the certificate or patent shall issue to his heirs or devisees, and the second, section 2292, providing that in case of the death of both father and mother, leaving an infant child or children, the right shall inure to the benefit of such child or children, was intended to give the land to infants exclusively only when there are no adult heirs.

2. SAME. *Act of congress, March 3, 1891, ch. 561, § 8, 26 Statutes at Large, 1099. Annulment of patent. Limitation.*

The act of congress, approved March 3, 1891, section 8, 26 Statutes at Large, 1099, providing that suits by the United States to vacate patents to lands shall be brought within a certain time, has no application to a suit brought by the heirs of one who made an entry of public lands for partition.

FROM the chancery court of Covington county.

HON. STONE DEAVOURS, Chancellor.

Holloman and another, appellants, were complainants in the court below; Bullock, appellee, was defendant there. From a decree in defendant's favor complainants appealed to the supreme court. The facts are stated in the opinion of the court.

McWillie & Thompson and *E. G. Caston,* for appellant.

A woman by the name of Amanda Pittman lived in Covington county and was the mother of three bastard children, each begotten by a different man. These bastards were William Pittman, Jr., deceased, the father of complainants Penora

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Brief for appellant.

Holloman (she being Williams' only heir), and W. M. Robertson and defendant Van Buren Bullock.

This woman, after the birth of her three illegitimate sons, entered from the United States Government the land in controversy under the homestead law, and took actual possession thereof. She thereafter married one Jesse Bullock, the father of Van Buren Bullock, appellee, one of her bastard sons, the marriage being long after the birth of the son.

The woman died in possession of the land before making final proof.

After the death of the woman, Jesse Bullock, her husband, and of course one of her four heirs (the other three being her bastard sons), took upon himself the task of proving up her claim to the land before the United States land department officers so as to procure a patent.

He knew all the facts, but nevertheless swore, in answer to interrogatories, as follows:

"I am the legal guardian of Van Buren, minor child of Amanda Pittman, who made the entry. She had one child, Van Buren. The land is used for the use of Van Buren, whom I represent as guardian. No other person but claimant, Van Buren Bullock, has any interest in the land."

Proper proof being made otherwise, the land department, on above representations, ordered a patent to issue, first, to the heirs of Amanda Bullock, deceased, but afterwards this order was amended so as to direct the issuance of the patent to Van Buren Bullock, and it was so issued.

The bill is by two of the heirs of Amanda, each claiming to own an undivided one-fourth interest in the land. They concede that Van Buren Bullock owns an undivided one-half interest, one-fourth he inherited from his mother, and the other fourth descended at his mother's death to her husband, Jesse Bullock. Of course Jesse Bullock's actions in causing the patent to issue to Van Buren Bullock estopped him, and his

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Brief for appellee.

heirs as well, from claiming the land. It is true also that Van Buren Bullock, under our statute, inherited from Jesse Bullock.

That the patent should have been issued to the heirs of Amanda Pittman (Bullock) is settled by law. Revised Statutes of the United States, sec. 2291.

The statute provides that in case of the death of a homesteader, his widow, if he has one, and if not, his heirs, shall be entitled to a patent. The chancellor went off on the idea that because Amanda was not a widow, therefore her heirs could take no interest. This was in the face of the rule for the construction of the revised statutes that "words importing the masculine gender may be applied to females." Section 1, Revised Statutes, U. S., page 1.

"He" means "her" in the statute. The subsequent portion of the statute relating to widows has no application to this case.

Complainants inherited from their mother and are heirs.

The statute of the state determines who are heirs of a decedent. Code 1892, sec. 1549.

Of course the false representations were fraudulent. If the patent were fraudulently procured to be issued to Van Buren Bullock, he holds the lands in trust for complainants, an undivided one-fourth for each.

There is no conflict between sections 2291 and 2292 Revised Statutes of the United States. The latter section only applies where there are no adult heirs. *Bernier* v. *Bernier,* 147 U. S., 242.

The statute of limitations, act of congress, approved March 3, 1891, only applies to suits brought by the United States.

T. S. Howell, for appellee.

This cause of action is barred by the statutes of limitations. 26 Statutes at Large, 1095, sec. 8.

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Opinion of the court.

Defendant Van Buren Bullock made the required proof.

On the 6th day of June, 1892, the patent issued to Van Buren Bullock, minor child of Amanda Pittman, deceased.

This bill was filed October 13, 1900.

Section 2291, Revised Statutes of the United States provides that "in case of a widow making such entry her heirs or devisee in case of her death proves by two creditable witnesses that she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been a homestead, except as provided in section 2228 and that he, she or they will ——— true allegiance to the Government of the United States," etc.

Complainants do not show that they have ever taken the oath that they "will bear true allegiance to the government of the United States of America."

Argued orally by *R. H. Thompson,* for appellant, and by *T. S. Howell,* for appellee.

CALHOON, J., delivered the opinion of the court.

Amanda Pittman was the mother of three bastard children. So situated, she entered the land in 1882. One Jesse Bullock afterwards married her. She died, leaving as her heirs this Jesse Bullock as husband, and Van Buren Bullock, W. M. Robertson, and William Pittman, Jr., her bastard children. She had no legitimate child. Penora Holloman, one of the appellants, appears as the sole heir of William Pittman, Jr. Jesse Bullock, the husband, indulged a presumption that he was *de facto,* if not *de jure,* the actual father of Van Buren. Whether he was or not, he demonstrated his faith by his works. He stood by Van Buren in a crucial test, and very freely made for him the sublime sacrifice of perjury in order that he might be the sole patentee of his mother's homestead entry to the ex-

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clusion of his two brothers. This fact, indisputable from the record, would end the case but for some questions of law which require attention. Amanda Pittman, before her marriage, and on February 3, 1882, made her application for entry of the land, though then she had been actually settled on it since 1879. She died May 23, 1886, before the five years had elapsed. On March 18, 1889, Jesse Bullock, representing himself as the legal guardian of Van Buren Bullock, and that the latter was the only heir, made final proof. The land commissioner, however, very properly issued the certificate, of date September 18, 1889, to "the heirs" of Amanda. Immediately then, of course, the title vested in her husband and three children as tenants in common, each with an undivided one-fourth interest. But for some cause not disclosed the commissioner, on November 7, 1891, without notice to the parties in interest, amended the certificate so as to give all to Van Buren Bullock. Perhaps, on a review of the proof, he was misled by the false affidavit of Jesse Bullock that Van Buren was the only heir, or perhaps he thought the case fell within section 2292, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1394). Jesse Bullock died in 1892, after this change. Section 2291, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1390), directs, in case of the death of the person making the entry, that the certificate issue to the "heirs or devisees" of such person, as was properly so done at first in the case before us. Section 2292 (U. S. Comp. St. 1901, p. 1394) provides that, "in the case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children." In the construction of these two sections it was held in *Bernier* v. *Bernier,* 147 U. S., 242, 13 Sup. Ct., 244, 37 L. Ed., 152, that they did not conflict, and that section 2292 was only intended to give to the minors exclusively when there are no other heirs.

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Syllabus.

The bill in the case before us was filed October 13, 1900, and appeared to by the defendant October 23, 1900, and so there is no bar of our statute of limitations. Section 8, c. 561, Act March 3, 1891, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), does not apply. It refers only to suits by the United States government to vacate and annul patents.

Complainants are entitled each to one-fourth interest in the land, and to partition as prayed by them, and it is so decreed here, and the cause is

Reversed and remanded for proper proceedings to partite.

ISHAM B. STONE *v.* ISAAC R. HEGGIE.

1. ASSAULT AND BATTERY. *Civil action. Two assailants. Separate liability.*

In the absence of evidence of a conspiracy between plaintiff's assailants, their acts not being joint, a plaintiff cannot recover in a civil suit for an assault and battery against one of them because of injuries inflicted by the other.

2. SAME. *Conflicting instructions.*

A plaintiff's instruction authorizing such a recovery is not cured by one, given at defendant's request, informing the jury that defendant is not liable for the acts of the other assailant.

3. SAME. *Weapons. Not deadly per se. Manner of use.*

The manner in which a weapon, not deadly *per se*, was used determines its character, and a charge to the jury, in a civil action for assault and battery, disregarding the manner of its use, its character being material, is erroneous.

4. SAME. *Insults. Use of stick.*

While insulting words will not excuse or justify an assault and battery with a deadly weapon, yet a party insulted may use a stick, if he do not use it in the manner of a deadly weapon.

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Brief for appellant.

FROM the circuit court of, first district, Carroll county.

HON. WILLIAM F. STEVENS, Judge.

Heggie, appellee, was plaintiff, and Stone, appellant, and another were defendants in the court below. From a judgment in favor of plaintiff against the appellant defendant appealed to the supreme court. The suit was dismissed as to the other defendant.

Frank Johnston, J. N. Flowers, A. A. Armistead, E. D. Stone and *Stone & Stone,* for appellant.

The jury were told by plaintiff's third instruction, unconditionally, to find for the plaintiff, if in fact the defendant struck the plaintiff with a stick in the second encounter, and if Dave Stone assaulted the plaintiff. This takes no account of any facts in justification, but proceeds on the one isolated fact of the assault. The instruction is directed expressly to the second encounter. It is not cured by the defendant's second instruction, but is in conflict with it.

It cannot be supposed that a jury can reconcile conflicting instructions, or harmonize instructions which apparently, and on their face, announce different rules of law.

It brings Dave Stone's assault in also as a basis for a recovery, although this occurred after appellant struck plaintiff in the second encounter.

The acts of Dave Stone may possibly have been part of the *res gestae,* but it could not be made the basis of a recovery either in whole or in part.

There was no conspiracy between I. B. Stone and Dave Stone, and the participation of the latter in the encounter was entirely independent of the action of appellant, and for which he was in no way responsible.

The second, fourth, fifth, sixth, and seventh instructions for the plaintiff are all erroneous in regard to the character of the weapon used, which was an ordinary walking stick.

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Brief for appellee.

The stick was not *per se* a deadly weapon. It may be conceded that it was for the jury to decide whether an instrument indifferent in itself is a deadly weapon. But this is to be determined by two essential facts:

One is the precise character and nature of the instrument, and the other, which is just as important and essential, is the precise manner in which it was used.

These observations are directed especially to the sixth instruction, which, while it told the jury that it was their province to determine whether the stick was a deadly weapon, entirely ignored the essential considerations by which this question is to be determined by a jury.

The fourth, fifth, sixth, seventh, and eighth instructions are erroneous in disregarding the manner in which the stick was used. It is not correct law, that a party insulted may not use a stick when it is not used in the manner of a deadly weapon. *Skidman* v. *State,* 43 Tex., 93; *State* v. *Huntly,* 91 N. C., 617; *Hunt* v. *State,* 6 Tex. App., 663; *People* v. *Rodrigo,* 69 Cal., 601; *Pittman* v. *State,* 25 Fla., 648; *Stevens* v. *State,* 27 Tex., 461.

The defendant did not, in fact, use the stick as a deadly weapon. He struck with the small end, and only struck one blow at the second encounter, and probably two at the first assault. The injury inflicted was slight. There was no effort made to follow up the attack. The blow did not knock Heggie down on either occasion.

Hill & Sisson, for appellee.

Before the enactment of our statute, words, no matter how insulting, would not justify assault and battery, and we can go no further than the statute, which limits the defense to assault or assault and battery.

It is contended that *Wood* v. *State,* 64 Miss., 761, applies. It is true that the syllabus bears out the contention, but the opin-

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Brief for appellee.

ion does not bear out the syllabus, and it would be taking a long step from the common law to justify a felony by "insulting words," and if they can justify an assault with a deadly weapon, they justify the taking of human life.

So far as Dan Stone is concerned, he and his acts constitute part of the *res gestae* and the story would be incomplete without Dan and his performances.

There can be no serious objection to stating the facts of the transaction in the instructions and telling the jurors if they believe them to find for the plaintiff, and to fully do this it was necessary to mention Dan and his acts, because he was on hand at both fights and promptly took part. It is immaterial whether he did this of his own motion or by agreement with appellant, his father.

The facts of the second fight are few, hence the third instruction is short, and although it recites what Dan Stone did, yet the jury was instructed that the suit against Dan had been dismissed and plaintiff could recover nothing for what he did, and of course his acts were only considered as part of the *res gestae*.

Much is said by appellant about "deadly" and "dangerous weapons," and it is contended that the jury was not permitted to decide the character of the weapon used. We respectfully submit that in each instruction on the subject the decision of that subject was left to the jury and one instruction for the plaintiff, at least, dealt entirely with that question.

It is not left in doubt, and it is not contended that Stone tried to shoot Heggie with the stick, but struck him with it. The stick was before the jury and ought to be in this court, but the description of it is in the record, and whether Stone struck him with the "big" or "little" end is in controversy.

It is well settled that mere blows with the "fist or foot" will not justify the use of a deadly weapon in repelling such assault and an insult cannot be resented in such a way.

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Opinion of the court.

Argued orally by *J. N. Flowers* and *Frank Johnston*, for appellant.

PRICE, J., delivered the opinion of the court.

This is a suit for damages in the circuit court of Carroll county by I. R. Heggie against I. B. and Dan Stone jointly, and grew out of assault and battery. In the fight I. B. Stone used a walking stick and Dan Stone used his fist. There were two separate assaults within an hour of each other, and two counts in the declaration; one upon each assault. Before the trial of the case in the court below, plaintiff dismissed his suit against Dan Stone, and elected to proceed against I. B. Stone alone. There is no pretense of any conspiracy on the part of the Stones to attack Heggie. There were others engaged in the fight.

The court gave for plaintiff below the following instruction:

"No. 3. The court instructs the jury, for the plaintiff, that if they believe that after the difficulty in the courthouse that Dan Stone and I. B. Stone and John Heggie and A. L. Heggie had another difficulty in front of Hawkins & McConnico's store, and just as this difficulty was over, plaintiff, I. R. Heggie, as he walked out of Henry Nelson's store asked, 'What is the matter out here?' and that he walked south toward Hawkins & McConnico's store, and that there he was assaulted by I. B. Stone with a stick, and struck over the head with it, and also assaulted by Dan Stone, and knocked into the alley between Hawkins & McConnico's and Nelson's, then they should find for the plaintiff on the second count in the declaration, and assess his damage at such an amount as they see proper, not to exceed in amount $3,000."

This instruction saddled upon I. B. Stone liability for the assault of Dan Stone upon the appellee. To relieve defendant Stone from this burden, the court gave defendant the following instruction:

"No. 7. The court instructs the jury that in this case I. B.

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Stone cannot be held responsible in damages for the acts and conduct of Dan Stone in evidence."

These instructions are in open conflict and misleading. The court also gave for plaintiff the following instructions:

"No. 6. The court instructs the jury that it is their province to determine whether the stick introduced in evidence as the one used by I. B. Stone in assaulting I. R. Heggie is a deadly weapon, or one capable of producing great bodily harm."

"No. 7. The court instructs the jury that insulting words will not excuse or justify an assault with a deadly weapon, one capable of producing great bodily harm."

The defense relied upon to justify the assault was insulting words. Where a party relies upon insulting words to justify an assault with a weapon not a deadly weapon *per se,* the question as to whether the weapon used was a deadly weapon or not depends upon the character of the weapon and the manner in which such weapon was used. The sixth instruction is erroneous in disregarding the manner in which the stick was used. It is not the law that a party insulted may not use a stick, when it is not used in the manner of a deadly weapon. The seventh and eighth instructions given the plaintiff below are subject to the same criticism, and this error is not cured by the sixth instruction for the appellee, which instructs the jury that it is their province to determine whether the stick introduced in evidence is a deadly weapon, capable of producing great bodily harm. In *Pittman* v. *State,* 25 Fla., 648, 6 South., 437, cited by counsel for the appellant, the court said: "That any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily a weapon likely to produce death." In *Skidmore* v. *State,* 43 Tex., 93, the court held that, where a weapon was not *per se* a deadly weapon, the mode and manner in which it was used will determine its character as such. We approve this doctrine. *People* v. *Rodrego,* 69 Cal., 601, 11 Pac., 481.

Reversed and remanded.

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Syllabus.

BOARD OF LEVEE COMMISSIONERS FOR YAZOO AND MISSISSIPPI DELTA v. PRESLEY NELMS ET ALS.

1. EMINENT DOMAIN. *Value of land. Evidence. Opinion of non-expert.*

In an eminent domain proceeding, it is competent for a witness, familiar with the land sought to be taken, to testify about crops which had been produced on it, its location, distance from transportation facilities, and the character of the soil, and therefrom to give his opinion of its value, although he is not an expert.

2. SAME. *Deeds. Recitals of value of neighboring land.*

Deeds to neighboring lands are not admissible in evidence in condemnation proceedings, although by their recitals they show the considerations paid for the lands conveyed by them.

3. SAME. *Sales of neighboring lands.*

Sales of neighboring lands of like quality as that sought to be condemned, and prices actually paid, may be proved in condemnation proceedings, in order to weaken opinions of value.

4. SAME. *Opinions of land values. No sales.*

Opinion evidence of the value of the lands sought to be taken is admissible in condemnation proceedings, although no sales of neighboring lands have been made.

5. SAME. *Laws* 1887, *chapter* 19, *p.* 22.

Under laws 1897, Laws, chap. 19, pp. 22-29, regulating eminent domain proceedings by the Board of Levee Commissioners for the Yazoo & Mississippi Delta:

(*a*) The jury must find for the land owner where the appraisers have awarded him damages, and he has appealed to the circuit court.

(*b*) A verdict for the land owner must, under section 9 of the act, be itemized.

(*c*) The sum awarded a tenant for his leasehold is not to be deducted from the sum awarded to the owner of the fee.

FROM the circuit court of DeSoto county.
HON. PERRIN H. LOWREY, Judge.

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Statement of the case.

The Board of Levee Commissioners for the Yazoo and Mississippi Delta, appellant, began proceedings, under laws 1897, chapter 19, pp. 22-29, against Nelms and others, appellees, to subject certain lands to levee purposes. The appraisers awarded appellees damages which were unsatisfactory to them and they appealed therefrom to the circuit court, where upon trial a judgment was rendered in appellee's favor and the board of commissioners appealed to the supreme court. An appraisement was made of the land sought to be condemned, allowing the appellees $55.50 per acre for part of the land that was on the outside of the levee and which would be protected by the levee, and $35.50 per acre for the part on the inside of the levee, that is, between the levee and the river. The appraisers also allowed the lessee of the land $4.50 per acre on both sides the levee. From this award the owners of the land appealed to the circuit court, but the lessee did not appeal. On the trial in the circuit court, the land owners were permitted, over the objection of the board, to prove the value of the land by testimony showing what it would rent for annually per acre, and what other land of like character in the same neighborhood would rent for per acre, and what said land would produce per acre in cotton, corn, etc., and, on that basis, what the witness' opinion was as to the value of the land; and this without first showing that the witness had any expert training. Appellant offered to introduce the records of deeds showing sales of like land in the same community, the dates of the sales, the parties thereto, and the prices as recited in the deeds paid for same. The land owners objected to this, and the objection was sustained. The court instructed the jury, for the land owners, that they must find a verdict for the cash value of their interest in the land, and itemize their verdict; that the parties who testified as witnesses in the case, but who were the appraisers in the case, were not entitled to any greater consideration, or their testimony entitled to any greater weight, than any other equally

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Brief for appellant.

creditable witnesses; that by condemning the land the levee board acquired an absolute title to the land; and that plaintiffs could not prevent such taking, and can only insist upon being paid the full and fair value for the land, and damages consequent upon such taking. The court refused to instruct for the levee board that the value of one year's lease must be deducted from the value of the land as shown by the evidence in the case. From a verdict and judgment for the land owners for $70 per acre for land outside the levee, and $60 per acre for that inside the levee, the levee board appealed to the supreme court.

J. T. Lowe, for appellant.

The court below erred in allowing appellee's witnesses, over the objection of appellant, to testify as to the probable yield of the land in controversy, and as to its productiveness and what said lands would rent for annually. 10 Am. & Eng. Enc. Law (2d ed.), 1162.

The court below erred in allowing appellee's witnesses to testify as to the value of the land in question, giving mere opinions of value, and blandly asserting the value, when said witnesses had not properly qualified, and did not base their testimony on any actual cash sales made for similar lands in the same vicinity.

What lands will rent for annually has nothing to do with its true cash value, and this is apparent on the lightest thought given the proposition.

The court below erred in granting the instructions asked by the appellees; first, because it wholly failed to instruct the jury that the owners were entitled to recover from appellant the value of the reversion, and rents reserved less abatement for present payment; that the said reversion is the fee less the term of said leasehold of one year. *Levee Commissioners* v. *Johnson,* 66 Miss., 248.

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Brief for appellees.

St. John Waddell, for appellees.

Appellant objected to proof of the fact of what the land taken had annually produced up to the time of the taking, and not what it was thought it would produce in the future. The court below properly overruled the objection to the above testimony. *Levee Commissioners* v. *Dillard,* 76 Miss., 641, 6 Am. & Eng. Enc. Law (1st ed.), 620, and notes.

The court below erred, says appellant, in admitting testimony of the rental value of the land taken, and other land on the same place and in the same neighborhood. The testimony was perfectly competent as one of the elements of the value of the land and as descriptive of the same, and as a fact or basis to aid in determining its value. This was expressly decided by this court in *Levee Commissioners* v. *Dillard, supra.*

This court expressly decided in *Levee Commissioners* v. *Dillard, supra,* that the opinion of witnesses as to the value of lands was perfectly competent where the witness was acquainted with the land and knew its value.

Deeds could only be offered as evidence on what was the value of the land in controversy. The record showed that a number of these deeds related to sales some seven or eight years previous, or in 1895 and 1896. Others were as late as 1900 and 1901. No evidence was offered with the deeds that the property conveyed therein was similarly situated, located, or of like character and value to the property in controversy, or that it was adjacent property or that the recited consideration in said deeds were the true considerations for the sales, or that said sales were made in the usual course of bargain and sale of lands for their full and fair value. *Rose* v. *Taunton,* 119 Mass., 99; *Esch.* v. *R. R. Co.,* 39 N. W. Rep., 129; *O'Hara* v. *Chicago, etc., R. Co.,* 28 N. E. Rep., 923.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

The cases of *Board* v. *Dillard,* 76 Miss., 641, 25 South., 292, and *Board* v. *Hendricks,* 77 Miss., 483, 27 South., 526, do not conflict. They are easily distinguishable. The former supports the court below in its rulings on the objection to testimony.

It is competent for a witness familiar with the particular land to say what crops it has been producing, its location, distance from a railroad or other means of transportation, the character of its soil, and from all this knowledge to give his opinion of its value. No showing of any expert training is required. 10 Am. & Eng. Enc. Law, 1157; 2 Lewis, Em. Dom., secs. 437, 435, 478, 443.

The introduction of deeds to show value, by their recitals of consideration paid for neighborhood land, is obviously incompetent. 2 Lewis, Em. Dom., sec. 443.

In weakening opinion values, it is competent to show by witnesses the fact of sales of neighboring land of like quality, and the actual purchase price. If no sales had been made, opinion of real value is none the less admissible. It would be curious if one's land should be held without value because there had been no sales of land in his vicinity. 2 Lewis, Em. Dom., end of sec. 478.

There was no error in the action on instructions under the act (Laws 1897, ch. 19, p. 22, *et seq.*). The jury necessarily had to find for plaintiffs, because the appraisers had awarded them damages, from which they, and not the board, had appealed to the circuit court; and the verdict had to be itemized, under section 9 of the statute; and the statute, not the jury, directs the fixing of costs.

The claim for deduction of $27.27 allowed for the one year's lease by the appraisers, and not appealed from by either side, is not sound. In the record this allowance of $27.27 to the tenant for the year, who was in under a tenant for life who had

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Brief for appellant.

died, appears to be "for the value of the leasehold"— the one year, then half gone — and then follows the allowance to appellees here of values and damages "as owners of the fee in remainder," and the contest was over that in the circuit court.

Affirmed.

HENRY WRIGHT v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Confession. Writing. Parol evidence. General objection.*

The introduction by the state of parol evidence of a written confession of crime will not constitute reversible error if no objection be made, nor will an objection made in terms so general as to obscure rather than present the point avail in such case.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Wright, appellant, was indicted, tried and convicted of wrecking a railroad train, Code 1892, sec. 1266, and appealed to the supreme court.

On the trial it was shown that defendant had made a confession, which had been taken down by a stenographer, and written out and signed by defendant. This writing, which was shown to have been in court, in the possession of the district attorney, was not introduced in evidence, but oral evidence was introduced to prove the same confession.

The course of procedure in respect to the matter in the court below is stated in the opinion.

D. Marshall and *B. S. Mount,* for appellant.

The confessions were written down and in possession of the court, and hence no oral evidence of the same could be introduced.

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Opinion of the court.

In *Peter's Case,* 4 Smed. & M., 31, the court says that it was error to allow a justice of the peace to testify from recollection of confession taken down in writing, when there was no evidence of the loss of the writing, and no other satisfactory legal reason for not producing it.

In the present case, not only was there no evidence that the confession of whose contents Smith and Landau testify was not lost, but it was shown to be in the possession of the state at the very time of the trial. Roscoe on Criminal Evidence lays down the same principle. He says: "If the confession is taken down in writing and signed by the prisoner, ... then it is put in as an ordinary document and read by the officer of the court. According to general principles, if the confession was contained in a document, which was in existence and admissible in evidence parol evidence could not be given of it. 1 Roscoe Criminal Evidence (8th ed.), 90; 2 Taylor's Evidence, ch. 10; *Wright* v. *State,* 50 Miss., 332.

J. N. Flowers, assistant attorney general, for appellee.

No objection was made in the court below to the oral testimony of the confession on the ground that the same had been written down, and the state was not called upon to produce the writing. It is true one witness, Landau, was asked if the confession had not been written out and signed by the accused, and if it was not then in their possession, and the witness answered that it had been written and was in their possession, but it does not appear that the defense insisted that it be produced. Hence these objections will hardly be considered here.

CALHOON, J., delivered the opinion of the court.

On consideration of the admissibility of evidence of a confession, in the absence of the jury, the state produced five witnesses. Early in the testimony of the first of these, it appeared that the confession was taken down by a stenographer. These

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Opinion of the court.

stenographic notes, extended, were shown to be in court. All the evidence showed that the confession was in writing, signed by the defendant, but no objection was made to the oral testimony. The defendant then introduced two witnesses and rested. So the whole testimony covers more than ten pages of this typewritten record. There had been up to this time no hint of any objection. Then, however, we find in the record these words, "The defense here moved that all of the testimony taken by the state be excluded," with no suggestion of the ground on which the motion was based, and which was overruled. To reverse for this would be to encourage an intolerable practice. The whole examination was then gone over with the jury in the box, with full cross-examination, as it was before the court in the first instance, without any objection, when, at the end of prolix examinations of witnesses about the confession, we find another general motion to exclude, with no reason given. Courts have some rights and the public has some rights in the disposition of public business. This court will take notice of rulings on objections to questions in the examination of witnesses, currently made, when no reason for the objection is given, if the reason be obvious. But it will not do so in an instance like this, where the objection, however obvious, comes, at the end of tedious examinations, in a motion to exclude. Moreover, here it must be assumed that no hurt could possibly have been done the defendant. The writing was there in court, subject to the demand of either side, and it was not produced to show any variance from the oral evidence. Astute counsel would have done this if they saw any help in it.

Affirmed.

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Syllabus.

GEORGIA STATE BUILDING AND LOAN ASSOCIATION v. EVERARD M. GRANT ET UX.

1. USURY. *Contract to waive. Public policy.*

A contract by a borrower to waive, directly or indirectly, the usury laws is against public policy and void.

2. BUILDING AND LOAN ASSOCIATION. *Contract stipulation. Final settlement. Rate of interest.*

Where a borrowing member of a buildng and loan association pledged his stock in the association and mortgaged other property as security for the loan, and the contract stipulated that "On the maturity of the stock so advanced upon, total payments of installments, interest and premiums shall not exceed the amount of the advance, with interest thereon at the highest contractural rate per annum allowed by the statutes of the state," the borrower is entitled to the benefit of the stipulation only on maturity of the stock.

3. SAME.

A provision in the by-law of a building association that, "where its loan contracts are governed by laws that limit the aggregate amount of premium and interest that can be taken on them, only so much of the premium collected shall be taken as profits by it as will, with the interest collected, equal and conform to the highest contractural rate of interest in such state, the balance of the premium being used at settlement" in reduction of the debt, gives the borrower the benefit thereof only on final settlement, after maturity of the stock.

4. SAME. *Stockholders' payments. Withdrawal fees.*

A complainant who seeks by suit to have the contract by which he, as a stockholder, borrowed money of a building and loan association declared usurious, is not entitled to have credited on the principal of his loan the sums paid by him in his character of stockholder on expense account or for fines and withdrawal fees.

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Statement of the case.

FROM the chancery court of, first district, Hinds county.

HON. HENRY C. CONN, Chancellor.

Grant and wife, appellees and cross-appellants, were complainants in the court below; the building and loan association, appellant and cross-appellee, was defendant there.

Grant and his wife, in March, 1896, took ten shares of stock in the Georgia State Building & Loan Association. In April, 1896, they borrowed $400 of said association, and to secure this loan they assigned to the association the ten shares of stock, and gave a deed of trust on lands in Hinds county, Miss., where they lived. The stock contract is evidenced by a certificate, which is distinct from the loan contract. In December, 1896, Mrs. Terry and her husband, who owned ten shares of stock in the said association, borrowed of it $600, and to secure this loan they assigned their stock to the association, and gave a deed of trust on lands in Hinds county, Miss. After the making of these contracts, Mr. and Mrs. Terry sold their property on which this deed of trust had been given and their stock to Mrs. Grant, upon the consideration of a certain amount of cash paid and the assumption by Mrs. Grant of the debt to the association. The contracts in both cases provided for the payment of six per centum interest and six per centum fixed premium on amount advanced. According to the contracts, these loans were payable in Savannah, Ga., but according to the by-laws of the association all payments may be made to local agents at the option of the borrower. There is also a provision in the by-laws that the local agent is to be the agent of the borrower, and not of the association. All payments of these loans were in fact made to the local agents of the association at Jackson, Miss. The contracts for the loans were made at Jackson, and the mortgages were on lands in Hinds county. There is a stipulation in the Terry contract, which is set out in the opinion of the court, by which the association agreed that, when the loans were paid up with six per centum interest and the premium,

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Statement of the case.

the interest should not exceed the highest rate of interest allowed by the law of the state where the contract was made or the sum advanced. After this contract was made, the association adopted an amendment to its by-laws providing that, where the contract of the loans of the association are governed by the laws of the state that limits the interest that may be charged as interest and premium, only so much of premium will be taken as profits as will, with interest collected, conform to the highest rate of interest allowed in such states on the sum advanced.

Grant and his wife filed the bill in this case, seeking to cancel the bonds and notes in the two loans, and to satisfy the liens of the trust deeds given to secure the loans, upon the grounds that both contracts were usurious, illegal, and void; the charge in the bill being that the payments made, in the way of dues on stock, interest, and premium, on the principal of the debts overpaid them, and left a balance due complainants. Answers were filed denying the charge of usury, and insisting that the contracts are solvable in the state of Georgia, and denying that they are usurious even under the laws of Mississippi. On the final hearing the chancellor held that the contracts were to be governed by the laws of the state of Mississippi; that they were usurious; that all partial payments made by way of interest and premium should be credited on the principal of said debts; that the amount paid on the expense account and charges for fines and withdrawal fees should not be credited on the principal of the debts; and referred the case to a commissioner to state the account on this basis. The commissioner made his report, to which both complainants and defendant excepted. The court overruled the exceptions, and rendered a decree fixing the amounts due in each case, and ordered the lands sold to pay it. From this decree defendants appealed to the supreme court, and complainants prosecuted a cross-appeal.

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Brief for appellant and cross-appellee.

Williamson, Wells & Croom, for appellant and cross-appellee.

The two contracts involved in this suit are not usurious, whether controlled by the laws of Mississippi or Georgia. The statute of Georgia and the decisions of the supreme court of that state, construing the statute with reference to the contracts of the appellee association, uphold the legality of these contracts. *R.* v. *G. S. B. & L. A.,* 102 Ga., 126; Laws Ga., 1890-91, p. 176; *Cook* v. *B. & L. Ass'n,* 104 Ga., 814.

But treating them as Mississippi contracts made between a nonresident building and loan association and citizens of this state and solvable under the laws of Mississippi, they are not usurious. While the rate of interest is fixed by the by-laws at six per centum per annum, and the premium at fifty cents per share of the stock loaned on, so written in the contracts, yet it is stipulated by the contracts and in the by-laws made a part of the contracts, that upon the maturity of the contract total payments of installments, interest and premiums shall not exceed the amount of the advance with interest thereon at the highest contractual rate per annum by the statute of the state. These contracts were made and the by-laws existed with these provisions in them, before the decision in the *Sokoloski* and *Shannon Cases,* holding that fixed premiums and interest exceeding ten per centum are usurious, and before there was any agitation in the courts of these questions of usury as to building and loan association contracts. This provision in the contract and by-laws of the association refutes the charges in the bill that the contracts were fraudulent and made to avoid the usury laws of Mississippi. There is no proof to sustain the charge in the bill, and the court will not presume a state of facts that makes the contract usurious, but on the contrary, will presume that the contract was made in good faith and is legal, if on any view it can be construed to be legal. *Brown* v. *Freeland,* 5 Ga., 181; *Wilkins* v. *Riley,* 47 Miss., 306.

In the case of *Godman* v. *B. & L. Ass'n,* 71 Miss., 310, this

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Brief for appellant and cross-appellee.

court holds that a member may bind himself to a building and loan association contract, and will be held to its performance.

In the case of *Loan Ass'n* v. *McElroy,* 72 Miss., 434, a borrowing stockholder, who has paid legal interest on his loan, may compel application of interest and premium, so paid, as legal dues and interest, and pay him the balance, but without withdrawing and ceasing to be a member, he cannot have a cancellation of his loan contract, but continues liable for dues and legal interest and for fines properly assessed against his stock.

Appellees never ceased to be members, did not withdraw from the association, but filed this bill to cancel their contracts. The very contracts in this case stipulated how all excess of interest and premium paid shall be applied, viz.: to the principal. In the contracts presented to this court, in *Sokoloski, Shannon,* and other cases, decided by this court, no such stipulations were in the contracts, the *Shannon Case* being a contract in appellant association, was made just after the association came into this state and was made without stipulations in the contract or in the by-laws. The record in that case presented a very different state of facts from the instant case. In the *Shannon Case,* the fact that it was a Georgia contract was relied on. The court held simply that the mere stipulation in the contract and by-laws that it should be a Georgia contract did not make it so, when all the facts showed the intention of the parties that it should be a Mississippi contract. The intention of the contracting parties in the two contracts now before the court was unquestionably that the interest and premium should not exceed the legal rate of interest either in Georgia or Mississippi. The intention was to comply with the law, and to make a legal contract.

The association could not, under these contracts, legally insist upon more than ten per cent of interest and premium upon the advance or loan, and the borrower did not agree to pay a greater rate than ten per cent. Surely such a contract will not be held

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usurious and void, where neither party intended to receive or pay usury, and none was stipulated for.

The proof in this case shows that the appellant is strictly a building and loan association dealing only with its members for their benefit, and that it is a successful association, maturing its stock regularly. The longest period of stock has run before maturity being 108 months, many having been matured in a shorter time.

Taking this period as a basis, appellees would have paid on the Grant loan $1,080.00, to mature the stock of ten shares, when the loan would have been paid and Mrs. Grant would have received upon her six investment shares, $600.00 in cash, the maturity of the four shares being applied to the settlement of the $400.00 loan.

The actual cost to Mrs. Grant for her loan would be $80.00.

A calculation as to the Terry loan demonstrates a like happy result. The maturity of her ten shares would have yielded her $400.00 in cash and the payment of the $600.00 loan.

In construing these contracts the court cannot in justice ignore the fact that the stock contract and the loan contract are separate and distinct, and the payment of dues on the shares not borrowed on, was in no sense a payment of the loans, and to mature this stock the borrower was receiving back her full share of the premium and interest paid, not only by herself, but also by all other members.

If our contention is correct, and these contracts are not usurious, then the decree of the chancellor was wrong in directing the commissioner to credit all payments of interest and premium on the principal in addition to the withdrawal value of the stock and the decree confirming the report of the commissioner was erroneous for that reason, and both of the decrees are wrong, for the further reason that they did not require

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Brief for appellees and cross-appellants.

complainants to be charged with the fines for nonpayment of dues.

It will not do to say that the amendment of the by-laws in 1899 made subsequent to these contracts did not apply to them, but to subsequent contracts only; because both of these contracts provide that the by-laws then in force and all future amendments should be a part of the contracts the same as if written therein.

Frank Johnston and *Stirling & Harris,* for appellees and cross-appellants.

The proposition that these contracts are governed by the laws of this state, and not by the laws of Georgia, is settled by the recent decisions of the supreme court, in the case of *Shannon* v. *Georgia State Building & Loan Association,* 78 Miss., 955.

We submit, that the amendment to the by-laws adopted after the contract with Mrs. Grant was made, cannot have the effect of validating the agreement in respect to the payment of usurious interest.

When this contract was made, in its inception, it was an illegal contract, under the laws of this state. It was entered into in violation of the laws of this state, and a legal obligation cannot for the first time be imposed upon the debtor by a subsequently adopted by-law of the association.

Mrs. Grant was not only under no legal obligation under the contract to pay any interest, but she had an absolute vested, legal right under the statute, to sue the association, and recover any and all interest that she paid.

The authorities concur in the view that all by-laws must be reasonable "and legal," and further, it must follow that a by-law cannot possibly have a retroactive effect as to existing contracts, which undertook to deprive the other party to the contract of any vested legal right that he had under the contract.

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Brief for appellees and cross-appellants.

Holyoke B. & L. Ass'n v. *Lewis,* 1 Col. App., 127, 4 Am. & Eng. Enc. Law (2d ed.), 1020.

The refunding of the excess of the ten per centum interest, under the by-laws, depends upon the ability of the association to earn dividends. If it failed to earn dividends to an amount that would enable it to refund the excess, then the stipulation becomes ineffectual and of no value.

The contract has been treated, throughout, and is now being treated by the association as one calling for the interest as stipulated for by its terms, and not as one coming within the operation of the by-laws. Neither the special stipulation in the Terry contract, nor the subsequently adopted by-laws can have the effect of validating that contract. It applies only to a settlement on the maturity stock, and not on a withdrawal settlement.

The chancellor should have allowed as a credit on the debts, the $1.00 per month which was applied by the building and loan association to the expense account.

The obligation to contribute to the expenses of the association rests solely, and exclusively, upon the fact that the stockholder is a member of the association, and, as such, is participating in the profits and receiving dividends on his stock.

When all right to profits and dividends is waived, then it would be inequitable, and unjust, to require the withdrawing stockholder to contribute to the expenses of the association without any consideration whatever.

The fines should not have been charged against the complainants. They were charged by the association after the complainants had notified the association that the contracts were usurious, and that they would make no more payments.

The "consideration" fee of $20.00 charged in the Grant contract is only a device to charge usurious interest, as the complainants had paid the attorney of the association $15.00 for an examination and abstract of their title.

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Opinion of the court.

Argued orally by *C. M. Williams,* for appellant, and by *J. B. Sterling* and *Frank Johnston,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The only proposition seriously pressed upon us by appellant is that the provision in the bond in the Terry case and the provision in the by-law in the Grant case, properly construed, each means that whenever a stockholder, in the exercise of his legal right under the contract to withdraw, attempts to withdraw, he is entitled *then,* however long prior to the maturity of the stock on final settlement, to have the account so taken as that he shall only pay, by way of interest, the highest legal rate allowed by the law of the state where it is sought to be enforced. The section in the bond is as follows: "It is further stipulated and agreed that, upon the maturity of the stock so advanced upon, total payments of installments, interest and premium, shall not exceed the amount of the advance with interest thereon at the highest contractual rate per annum allowed by the statute of the state aforesaid." It is too plain for argument that this means that the stockholders shall have the benefit of such provision only upon the maturity of the stock advanced upon. There is no room for construction; the meaning is plain.

The by-law referred to is as follows — being section 12 of article 6 of the by-laws, incorporated May 24, 1891: "The board of directors, in their discretion, shall have power and authority to make such contracts with stockholders, both with regard to stock subscriptions and withdrawal privileges and advances and loans, as shall seem to them to the best interest of the association, provided that wherever the loan contracts of this association are governed by laws that limit the aggregate amount of premium and interest that can be taken on them, only so much of the premium collected shall be taken as profits by the association, as will, with the interest collected, equal and conform to the highest contractual rate of interest in such state,

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the balance of the premium being used, *at settlement*, in reduction of the debt." The words "at settlement," in this by-law, mean the same thing as the words, "upon the maturity of the stock advanced upon," in the bond given by Terry. We think there is no room for construction as to them, and that they plainly mean that the only case in which the stockholders would be entitled to the benefit of the stipulation in the bond in the one case, or the provision of the by-law in the other, would be upon final settlement, when the stock had been carried to maturity. This would be in accordance with the usual building and loan scheme, which does not contemplate, usually, anything other than carrying the stock to maturity, and thus completing the contract.

But, apart from this, it is perfectly plain from the testimony of E. W. Bell, secretary of the association, that the construction which we put upon the by-law and stipulation in the bond is just the construction intended by the association. He says: "Just here I will explain that in the books there will appear in red ink, at the end of each fiscal year, the amount of dividend apportioned to the stock. This will be shown on the transcript, but it *must be understood* that this is only a *tentative credit*, and goes to the stock *only in case it is carried to* maturity. If stock is withdrawn before maturity, it *does not receive* this dividend as a credit, but its withdrawal value is ascertained by loan fund payments with interest for the average time at six per cent." Again, he says: "To illustrate: If Mrs. Grant was in good standing with her stock, and had paid all arrearages of interest and premium, and wanted to buy out, without using the stock, she would have to pay $400, the amount of the advance; or, if she wanted to use the stock at its withdrawal value, as part payment, she could do so; but she would not be entitled to receive any part of her interest and premium payments *in reduction of the debt*, as the interest allowed upon the loan fund payments of the stock would be in lieu of her rights to partici-

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pate in the earnings of the association. *This right she surrenders when she elects to withdraw.*"

This shows that the association meant precisely what it has said, and what they have said is too plain for dispute. But, further than this, these two contracts have been dealt with from the first by the association upon the basis of only allowing the benefit of the by-laws and the stipulation in the bond on final settlement, when the stock has been carried to maturity. The association was proceeding all along upon the construction of Mr. Bell, which is correct. We have, therefore, not only the plain provision of the by-laws and the stipulation in the bond, but also the construction placed upon it by the secretary of the association, who, presumably, is daily making hundreds of settlements on this construction. But we have added to this the fact that this construction has been put into practical operation in both contracts under review. The counsel for appellants, it is true, argued at the bar that Mr. Bell's construction might be wrong. And so it might, and we are not founding our opinion upon Mr. Bell's construction, but simply refer to the fact that he has so construed these provisions of the bond and by-law as very persuasive of the *intention* of the association in the matter. Counsel further argued that these provisions were in exact harmony with a provision, which the supreme court of North Carolina, in the *Meroney Case,* 116 N. C., 912, 21 S. C., 934, 47 Am. St. Rep., 841, said would save the contract from the taint of usury. That opinion on this subject is as follows: "It may not be improper for us to say, in this connection, that the insertion in such a contract as we now have under consideration of a stipulation that *in no event* should the aggregate of all the sums to be paid by the borrower (*interest being allowed to his credit*) exceed the sum loaned him and interest thereon at eight per centum per annum would perhaps entirely relieve all such transactions from the imputation of being usurious. The remedy seems easy. It is insisted with great confidence that

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the rate of interest which he would be required to pay if he and his fellow borrowers would carry out their engagements will be much less than six per centum. If that be true, no loss can come to the lender by reason of the incorporation of such a stipulation in the contract. It would be merely to make *that* a part of the contract which is in fact an inducement to it, but an inducement put in such shape as to be of no legal effect to protect the borrower from usurious exactions. The proposition is a simple one. Let the money-lending corporations that, under the guise of building and loan associations, are professing to loan money, in a complicated and somewhat confusing method, at six per centum or less, insert in their contract a binding stipulation to the effect that *in no event* will they exact more than eight per cent, and all trouble and difficulty will vanish."

It must be obvious, upon the mere reading of this utterance, that it is vitally different from the stipulation in this bond and by-law. What the supreme court of North Carolina said was that, if the benefit of this sort of provision, *in any event,* was allowed the borrower, then it would save the contract from the taint of usury; that is, on withdrawal as well as at maturity of the stock.

On the whole, we think the learned chancellor was entirely correct in the conclusion reached, both on appeal and cross-appeal in both cases.

There is nothing in the cross-appeal. The chancellor correctly disallowed the credits claimed therein. This results from the dual nature of the building and loan contract in a true building and loan association, as this is. *People's B. & L. Ass'n* v. *Hawks,* 81 Miss., 61; s. c., 32 South., 1001.

We only add that the by-law in the Grant case would not become a part of the contract here, for the reason that Mrs. Grant had the *legal* right, *before it was adopted,* to sue for and recover the usury. This right was a right *vested by law,* not by the contract; and it was not competent for the association,

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Syllabus.

or the association with Grant jointly, to *change* or *alter* the *usury law of the state* by any by-law of its own, or to impair rights vested in Mrs. Grant by virtue of that usury law of the state and our decisions construing it, and holding Mrs. Grant entitled to recover the interest in an action at law, or have it allowed in equity. The provision that she would be bound by all by-laws then in force or thereafter to be adopted would bind her as far as a *contract could. But she could make no contract* to waive the usury laws of the state, nor could any by-laws adopted after her contract was made have any such effect. Public policy forbade both. Appellant must see the clear distinction. Appellant says the effect was to bring the contract within the law, not to evade it. Granted; but before the by-law was adopted Mrs. Grant's legal right, law-conferred, to recover all the interest, the usury having already tainted the contract, had attached, was a valid right, and could not be *contracted away,* such a contract being forbidden to be made by law.

Affirmed on appeal and cross-appeal.

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JOSEPH W. DICKERSON *v.* MARTHA S. ASKEW.

CHANCERY PRACTICE. *Oral evidence. Code* 1892, § 1764. *Equity cause.*

Under code 1892, § 1764, providing that "in all proceedings in matters testamentary and of administration, in minors' business and in cases of persons of unsound mind, and on the hearing of motions to confirm sales and in similar cases," witnesses may be examined orally in the chancery court, but further providing that "this shall not change the rule as to . . . cases in which depositions generally are authorized," the two clauses must be construed together, and so construing the section, the taking of oral proof on notice in an equity case to enforce a vendors' lien is not authorized.

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Brief for appellants.

FROM the chancery court of, first district, Panola county.

HON. JAMES C. LONGSTREET, Chancellor.

Dickerson, appellant, was complainant in the court below; Mrs. Askew, appellee, was defendant there. The suit was to enforce a vendor's equitable lien on lands. Defendant, besides answering, made her answer a cross-bill, alleging failure of complainant's title and surrender of possession by her to another having a superior title, and she filed a written notice that, on the trial, proof would be taken orally before the chancellor, no depositions having been taken. Over complainant's objection, oral proof was taken, on which there was a decree for defendant, from which complainant appealed to the supreme court.

The principal assignment of error was predicated of the action of the court below in hearing oral testimony and deciding the case upon it.

Boothe & Boothe and *Miller & Miller,* for appellants.

There was no "agreement in writing" or otherwise, between the parties, to take oral proof by the examination of witnesses in open court, even if permissible at all by agreement in an equity suit of this character. Notice was filed by defendant to examine witnesses in open court, but we most earnestly submit that the context and phraseology of section 1764 clearly restricts such notice to the cases therein enumerated and does not embrace the case at bar. In fact, in order to avoid any misconstruction, and to further emphasize the limitation of the rule to the class of cases enumerated, the last clause of the section expressly says: "But this shall not change the rule as to nonresident witnesses or cases in which depositions generally are authorized." Now what does this last clause mean, and what "rule" is it that shall not be changed. The statute was providing a new method of taking testimony in the class of cases enumerated, viz: by oral proof, and it was not intended that this new method, and which was an innovation upon an

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Brief for appellants.

old established rule, should apply to any other cases than those specifically enumerated. Had it been intended to include strictly equity suits like that one at bar, or, in other words, had the section in question been intended to apply to all cases in chancery and prevent the taking of oral testimony in any and every suit in equity, then surely a much shorter section and fewer and plainer words would have been adopted. If the construction of section 1764 claimed by opposing counsel to apply to all cases in the chancery court is correct, then why the necessity of the first clause of said section enumerating the cases in which oral testimony may be taken?

Opposing counsel may rely upon *Cox* v. *Kyle,* 75 Miss., 667, to sanction their contention as to the construction of section 1764. An examination of that case will discover the question here involved was not then presented or necessary to the decision of that case, and if anything stated in that opinion could be construed as holding that oral testimony would be admissible under the circumstances of the case at bar, then it could only be regarded as an *obiter dictum* and could not be a precedent.

"The opinion of courts must be construed in the light of the facts of the cases in which they are delivered." *Wilkerson* v. *Jenkins,* 77 Miss., 603.

" . . . But it is not always safe to accept without question what is laid down in text books or the opinions of courts." *Smith* v. *Ratcliff,* 66 Miss., 689.

"A judicial tribunal, when referred to a previous decision as an authority respecting the law looks at the state of the record and the facts of the case, and the subject-matter, before it undertakes to weigh the words used by the judge in pronouncing the opinion, and limits the effect and scope of the words by what thus appears." *Wilson* v. *Kohlheim,* 46 Miss., 365.

"Such is the flexibility of language, and even of sentences, disconnected from their context, as well as the special state of facts to which they have been applied, that in courts it has

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Brief for appellee.

become a settled rule that all adjudications are to be considered only in connection with and as explained by, and limited to the state of circumstances appearing in the record." *Pass* v. *McRae,* 36 Miss., 148; *Wells' Res Adjudicata,* secs. 581, 583, 585, 590.

L. F. Rainwater, for appellee.

Section 1764 has been construed by this court against the contention of appellant. *Cox* v. *Kyle,* 75 Miss., 667.

In the concluding part of the opinion in that case the court say: "Such oral proof is admissible in matters of this kind only when notice is filed or the written agreement of the parties is made therefor, under section 1764, Ann. Code, 1892."

In *Grego* v. *Grego,* 78 Miss., 445, the practice of filing notice is distinctly recognized and approved.

While the case last cited is not a direct adjudication of the question now under consideration, it is a very clear indication as to what the proper practice should be, and, considered with the case of *Cox* v. *Kyle, supra,* it seems that the question has been settled by this court in favor of the practice.

I insist further that the question of taking oral testimony in chancery courts is one of practice only, and the universal practice of the chancellors of the state, so far as my knowledge and information extend, is to allow oral proof upon notice, as was done in the case at bar.

I submit that this practice having been adopted by the chancellors under the authority of the cases cited, it would be a hardship for litigants to have their cases reversed and to be taxed with the costs for having followed a universal practice based upon such a clear intimation of the supreme court in the cases cited above.

The first paragraph of section 1764, down to the period enumerates a class of cases in which oral proof may be taken without notice or agreement. This paragraph is complete

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within itself, and has no connection with that which follows. The second paragraph is broad and comprehensive, and includes "all cases where a party shall desire to have the witnesses examined in open court" and no depositions have been taken.

Section 1760 provides the manner of making oral testimony a part of the record and for taking bills of exceptions as in the circuit court, and seems to contemplate the taking of oral proof "in all cases."

There can be no injustice in this rule of practice, and it commends itself to the practitioner as a very wise and satisfactory method of arriving at the true facts of a cause.

CALHOON, J., delivered the opinion of the court.

This is a case of general equity cognizance. It does not involve, and is not in any way similar to, matters testamentary or of administration, or minors' business, or cases of persons of unsound mind, or motions to confirm sales, mentioned in the first clause of section 1764, Code 1892. Proceeding under that clause, appellee gave written notice that she would ask leave to have witnesses examined in open court, no depositions having been taken. The court below, over appellant's objection, permitted oral evidence, and on that decreed for Mrs. Askew, and complainant, who is also defendant to a cross-bill, appeals, without any evidence appearing in the record, from the overruling of his motion for decree on the pleadings.

The rule was universal to try all equity causes on depositions. It is, of course, and must remain, universal to the full extent not changed by statute. It has never been changed unless by legislation, the history of which we will quite summarily review.

When we had the probate court system, it was permitted to introduce oral evidence in matters pertaining to the jurisdiction of that court. The constitution of 1869 (section 16, art.

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6) gave all this jurisdiction to the chancery courts, whereupon the legislature saw fit to apply the probate practice to the new jurisdiction of the chancery courts, and allow oral testimony as to that (Code 1880, secs. 1950, 1951), but did not require notice that witnesses would be produced for oral examination. In this state of the law there was enacted a section in the Code of 1892 as follows:

"1764 (1950, 1951). *Witnesses Examined in Open Court in Chancery.* In all proceedings in matters testamentary and of administration, in minors' business, and in cases of persons of unsound mind, and on the hearing of motions to confirm sales, and in similar cases, witnesses may be produced and examined in open court, or their depositions may be taken as in other cases in chancery courts. In all cases where the party shall desire to have the witnesses examined in open court, he shall, before any depositions have been taken, file a notice to that effect, or the parties may agree in writing in any case to have all or a part of the witnesses examined in open court; but this shall not change the rule as to nonresident witnesses or cases in which depositions generally are authorized."

Is this section restrictive or enlarging? Was it the purpose to radically change the general equity rule of practice of taking evidence by deposition only, or was it to prevent oral testimony, even in probate court matters and the confirmation of sales, except upon notice? The inquiry must begin, proceed, and end in full view of the thoroughly well settled canon of interpretation in Mississippi that the common law stands unless a legislative design to change it plainly appears in a statute. If the purpose be doubtful, on fair construction, the common law continues to prevail. If it was the purpose of section 1764 to revolutionize the whole equity procedure in proof taking, it seems easy to have said so in unmistakable terms. If it meant to do this, there was no sort of necessity for the first clause of the section. But if the first clause was designed to mean some-

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Opinion of the court.

thing, then, on the settled doctrine of construction: *"noscitur a sociis,"* the words "in all cases" in the second clause must be referred to the matters detailed in the first. This would result in applying the general equity practice of taking depositions even to those matters, unless, as to them, notice be filed.

Neither *Cox* v. *Kyle,* 75 Miss., 667, 23 South., 518, nor *Grego* v. *Grego,* 78 Miss., 443, 28 South., 817, commits this court on the question now before us. Section 1764 is restrictive, and not enlarging. Our conclusion gives meaning to the words in the last two lines of the section, "but this shall not change the rule as to . . . . cases in which depositions generally are authorized," which otherwise are utterly useless. No rule of interpretation admits of treating the first clause as if it were an independent section, and as meaning, regardless of the second clause, that, in matters it enumerates, oral proof may be taken without notice. It does not say so, and, if it meant so, manifestly the opening words of the second clause, instead of being "in all cases," would have at least been "in all other cases." The two clauses must be construed together. The two make the section.

While this case is reversed, we do not feel that we should enter decree here for appellant on this mistake as to practice, and so we reverse and remand, with ninety days, after mandate filed below, to the parties to take proof.

Reversed and remanded.

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Statement of the case.

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STATE OF MISSISSIPPI v. THADDEUS E. MORTIMER.

CRIMINAL LAW. *False pretenses. Public school teacher. Indictment.*

An indictment against a public school teacher charging that, with intent to defraud the county, he made a false report to the county school superintendent for the second month of his school, upon the faith of which he was allowed a second assistant teacher for the third month, and that with intent to defraud, etc., he obtained a teacher's pay certificate for such assistant, is demurrable in the absence of a charge that the attendance on the school for the third month did not entitle defendant to the second assistant during said third month, and that the certificate was not compensation for services actually rendered by said assistant during the third month.

FROM the circuit court of Tippah county.

HON. PERRIN H. LOWREY, Judge.

Mortimer, appellee, was indicted for obtaining a teacher's pay certificate by misrepresentations. A demurrer to the indictment was sustained, and the state appealed to the supreme court.

The indictment in this case, leaving off the formal parts, is as follows: "Thaddeus E. Mortimer, late of the county aforesaid, on the 4th day of January, 1902, in said county, being then and there the principal of the Blue Mountain white public school in said county, and it being his duty under the law to make monthly reports to the county superintendent of education of said county of the number of pupils in attendance upon said public school, and the monthly average of said attendance of pupils, the said Thaddeus E. Mortimer, as teacher aforesaid, with the intent of him, the said Mortimer, unlawfully, designedly, feloniously, falsely, and fraudulently to cheat, wrong, and defraud the said county of Tippah, then and there did unlawfully, feloniously, designedly, falsely, and

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Brief for appellant.

fraudulently, by virtue of a false token and writing called a monthly report of said school, pretend that the school report made by him, the said Mortimer, on the 4th day of January, A.D. 1902, for the said month of the Blue Mountain public white school in said county beginning on the 2d day of December, 1901, and ending on the 30th day of the same month, was true, and by said report did say that there was in attendance on said school for said month, an average attendance of 82 3-20 pupils, whereas in truth and in fact there was an average attendance of less than 80 pupils for said month, by means of which false pretenses, and false report of the average attendance of pupils for said second month at the said school, he, the said Thaddeus E. Mortimer, was permitted by the county superintendent of education to have a second assistant in said school for the third month of said school, which assistant would not have been allowed for an average below 80 pupils for second month, and by means thereof, and with intent of him, the said Mortimer, unlawfully, feloniously, designedly, falsely, and fraudulently to cheat, wrong, and defraud the said county of Tippah, did, on the 25th day of January, 1902, in said county, unlawfully, feloniously, falsely, designedly, and fraudulently obtain from the county superintendent of education for said county a teacher's pay certificate for said second assistant teacher, of the value and for the amount of thirty-one dollars, and then and there did unlawfully, feloniously, falsely, and designedly obtain from the chancery clerk of said county a warrant on the teacher's fund of said county for thirty-one dollars, and for the value of thirty-one dollars, for the said second assistant teacher in said school, against the peace and dignity of the state of Mississippi."

J. N. Flowers, assistant attorney general, for appellant.

It cannot be said that the act of appellee in making his second monthly report show an average for that month of 82 3-20

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Brief for appellee.

pupils when the average was really below 80, was too remote as a cause for the issuance of the pay certificate. It is remote only in time, the connection is direct. It clearly appears from said indictment that the pay certificate would never have been issued to the second assistant but for this act of appellee in making his register show an average of more than 80 pupils for the second month. At the end of the second month the facts were furnished by the appellee upon which it was determined whether there would be a second assistant for the third month. Nothing but a showing made of an average of more than 80 pupils for the second month could place the second assistant where he could get his pay for the third month.

The false representation need not be the sole inducement to the parting with the property, and it is sufficient if such pretenses constituted a material part of the inducement. *Smith* v. *State,* 55 Miss., 513, is not exactly in point, but it serves to illustrate it to some extent.

This court will take judicial knowledge of the fact that the money paid out on a county superintendent's pay certificate is the money of the county.

It is not necessary to show that accused received any benefit from the property, or from his false pretenses. The law is intended for the protection of the owner of the property and it matters little what was done with it after it has gone into the possession of the wrong doer.

Jones & Knox, for appellee.

If the report was false and the principal obtained anything by it, he only obtained employment of the second assistant for the third month of the school. The indictment nowhere says the third month's report on which the $31.00 was obtained was not true. The indictment is fatally defective, because it does not negative the idea that the third month report was true on which the money was procured. If the school made the average

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Opinion of the court.

requiring the assistant for the third month and she rendered the services as teacher in said school, the public had a right to her as teacher and she had a right to the $31.00 obtained on said third month's report. The report contained the required average or the pay certificate would not have been issued. It was clearly understood and agreed that the contract was for the assistant, and the law requires that the pay certificate be issued to the assistant and not to another. Code 1892, sec. 4058.

The money was not paid in consequence of the average made by the second month, but as compensation for services actually rendered by the assistant during the third month. This case is governed by the opinion laid down in the case of *Bowler* v. *State,* 41 Miss., 570. Pay certificates can only be issued separately on each monthly report, and must be issued for services rendered.

The false pretense, if any, was too remote for obtaining the money. The contract mentioned in the indictment, the month's services rendered by the assistant, the making and certifying to the correctness of the third month's report by the trustees, on which the money was obtained, all intervened between the time of the making of the second and third month's report. On "remote pretense" see 12 Am. & Eng. Enc. Law (2d ed.), 814.

PRICE, J., delivered the opinion of the court.

The indictment against appellee is defective in not alleging substantially that the attendance during the third month did not entitle the school to the second assistant for the said month, and that the warrant was not compensation for services actually rendered by the assistant during the third month. It should have negatived the idea that the payment was made for the services rendered by the assistant during the third month, and with the average attendance entitling the school to a second

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Brief for appellants.

assistant. The presumption is that the money was paid for services actually rendered, and with the requisite number of pupils, and not on account of any misrepresentations made by the appellee.

Affirmed.

WILLIAM N. COLLINS ET AL. *v.* JAMES A. BOUNDS ET UX.

HOMESTEAD. *Abandonment. Temporary absence. Animus revertendi.*

A temporary removal from the homestead by husband and wife because of necessity, they retaining an intention to return to the premises, is not such an abandonment of the home as will render valid the deed of the husband threto, in which the wife did not join, under code 1892, § 1983, providing that a conveyance by the husband of the homestead shall not be valid unless signed by the wife, etc.

FROM the chancery court of, second district, Marion county.
HON. STONE DEVOURS, Judge.

Bounds and wife, appellees, were complainants and Collins and another, appellants, were defendants in the court below. From an interlocutory decree, overruling a motion to dissolve injunction, defendants appealed to the supreme court. The opinion states the facts of the case.

Mounger & Mounger and *Harper & Potter,* for appellants.

At the time the deed was executed to Collins, Bounds and his wife were not residing on the property. It was, therefore, necessary for them to show beyond question that they had ceased to reside on the homestead alone because of some casualty or necessity within the meaning of the statute. *Majors* v. *Majors,* 58 Miss., 806.

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Brief for appellees.

If the casualty or necessity for leaving the homestead be not such a casualty or necessity as is recognized by law, then the fact that they had a purpose of returning to the homestead cannot avail them. *Moore* v. *Bradford,* 70 Miss., 70.

There is no pretense in this case that Bounds ceased to reside on the homestead because of any casualty, and the only necessity shown by the evidence is that he did not own a horse with which to cultivate his own land, and, therefore, found it more advantageous from a business point of view to cultivate his father-in-law's land.

This is not such a necessity as the law contemplates to justify the abandonment of a homestead. It was not a necessity arising from an "emergency of an exceptional and temporary character." *Thompson* v. *Tillotson,* 56 Miss., 36.

Weathersby & Mayson, for appellees.

Appellants rely on the case of *Majors* v. *Majors,* 58 Miss., 806, to support their contention. Upon examination it will be seen that that case is an authority for appellees. Both Mr. and Mrs. Majors owned a home, they moved to the wife's land and while there Mr. Majors executed a conveyance to his homestead, but died while he and his wife were residing upon her land. Had he lived to return to his homestead, it will not be seriously contended, as we take it, that his conveyance would have divested his wife of her rights in his homestead. The conditions existing at the time of the execution of the instrument determine its validity. *Cummings* v. *Busby,* 62 Miss., 195.

No doubt Majors intended to return to his homestead when he temporarily abandoned it, but died before he could do so.

It needs no authority to support the proposition that the husband has the right to select and fix the domicile of the family.

Though Majors might have entertained the intention to return to his home as long as he lived, but as a matter of fact he

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Brief for appellees.

did not do so, and the rights of his wife in and to his homestead were predicable on his, and he having died away from it, the rights of the wife passed away at his death. Her rights were dependent upon his, and when death cut short his intention she had no interest in his land when she didn't reside there, and especially so when she was living on lands belonging to herself. But the case of appellees is very different from the Majors case. The wife had no lands of her own, the husband intended to return and in fact did return. If he had died while at Buckhalters the case might have been different. It must be remembered, however, that the case of *Majors* v. *Majors, supra,* was decided before section 1258, Code 1880, and 1983, Code 1892, were enacted; under Codes 1880 and 1892, no conveyance, etc., of a homestead, unless it be signed by the wife, or the owner if he be married and living with his wife, is valid.

Appellants contend that the burden of proof is on appellees to show that their absence was temporary, caused by some casualty or necessity, and with the purpose of speedily reoccupying the same. While we have shown this, it is not incumbent on us. There is quite a difference when the proceedings are *in vitum* and when the relations are contractual. Under the former, when an exception or attachment had been levied upon the homestead, it would devolve upon the debtor to show that his absence was due to some of the reasons mentioned in section 1981, Code of 1892; because it would be a case for the application of the maxim of the common law in case of public officials: "*Omnia praesumuntur rite et solcuniter esse acta.*" But no such presumption attaches when the relation between the parties are contractual, for they are supposed to know with whom they are contracting; to be acquainted with the subject-matter of the contract, and when he does so with reference to a homestead, unless he secures the signature of the wife of the homesteader, omits to do so at his own peril.

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Opinion of the court.

A conveyance, etc., is of no validity whatever unless it be signed by the wife. *Gatti* v. *Supply Co.*, 77 Miss., 754, 27 So. Rep., 601; *Gulf, etc., R. Co.* v. *Singleterry*, 78 Miss., 772, 29 So. Rep., 754; *Johnson* v. *Hunt et al.*, 79 Miss., 639, 31 So. Rep., 205.

CALHOON, J., delivered the opinion of the court.

This appeal is from a decree overruling a motion to dissolve an injunction which had been granted to Bounds and wife, restraining appellants from committing waste on a 40-acre tract of land. The sole question involved is whether or not there had been such an abandonment of the homestead as to enable the husband, without the wife's joinder, to make a valid conveyance of part of it. The chancellor had evidence before him, which no doubt determined his action, to the following effect: The husband made a homestead entry from the government of the United States of one hundred and twenty acres of land, which included the forty acres in controversy. He owed W. N. Collins the entry money—about $31—which he had borrowed from him to make the entry. The dwelling house and garden and other little improvements of Bounds, including a few acres of cleared land, would have continued to have been occupied by him and his wife but for the death of his only horse, which left him unable to work his land. At this juncture his father-in-law, who lived four miles distant, offered him the use of a horse and land to cultivate, so that he might make a crop and realize enough to enable him to buy a horse and cultivate his homestead land. This offer he accepted, and he and his wife went to her father's with this specific object, and with the express purpose to return after making and marketing the crop; and the object was accomplished, and thereupon they did return to the homestead, which they never had any intention to permanently abandon. It is to be particularly noted that on going to the father's they left on their premises some of their house-

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Opinion of the court.

hold and kitchen furniture and effects, and farming implements and gearing, and returned to the house, "backward and forward," to look after them, and some cows and yearlings and hogs, and some vegetables in their garden, they had also left there. Now, while they were at their father's, W. N. Collins came with a justice of the peace, and with a deed prepared for signature and acknowledgment, and J. A. Bounds signed and acknowledged it; but the wife refused to do so, but offered to join in a conveyance of another forty acres of the one hundred and twenty-acre entry, situated farther from the home, but Collins refused this. She also tendered to Collins the $31 he had loaned to Bounds to make the entry, and he refused that. After this the husband and wife went back to their home. It seems that there was some sort of agreement between W. N. Collins and Bounds that Bounds should convey forty of the one hundred and twenty acres entered.

In full view of the cases of *Majors* v. *Majors,* 58 Miss., 806; *Moore* v. *Bradford,* 70 Miss., 70, 11 South., 630; and *Thompson* v. *Tillotson,* 56 Miss., 36, we hold, in the case at bar, on its facts, that there was no abandonment of the homestead; that the removal from it was because of necessity and temporary, and that this ruling is consistent with the decisions above cited; and that the chancellor properly overruled the motion to dissolve the injunction.

Affirmed and remanded for such other proceedings as may be proper.

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Statement of the case.

ABERT S. JOHNSON ET AL. v. GULF & CHICAGO RAILROAD CO.

1. CARRIERS. *Railroads. Freight. Mistaken delivery. Suit.*

Where a carrier by mistake delivered freight to a person not entitled to receive the same, it may sue such person in trover for the property, or waive the tort and sue for the value of the goods, without an assignment to it from the owner.

2. SAME. *Partnership. Assignment by one partner.*

Where property belonging to a partnership is mistakenly delivered by a carrier to a stranger, and the carrier pays the partnership therefor, receiving an assignment from only one of the partners of his interest therein, it may sue the stranger for the value of the goods, notwithstanding the failure of the other partners to join in the assignment.

FROM the circuit court of Tippah county.

HON. PERRIN H. LOWREY, Judge.

The railroad company, appellee, was plaintiff in the court below; Johnson and others, doing business under the copartnership name of Johnson, Nesbitt & Co., were defendants there. From a judgment in plaintiff's favor defendants appealed to the supreme court.

Appellants were cotton buyers in Birmingham, Ala., and in the fall of 1897 had an agent at Pontotoc, Miss., buying cotton. J. W. Taylor & Co., of Corinth, Miss., had bought some cotton at Pontotoc, on the line of appellee's railroad, and in November, 1897, twenty-six bales of their cotton were delivered to the appellee railroad company, but by some mistake this cotton was shipped to appellants, Johnson, Nesbitt & Co., via the Southern Railway Company, to Decatur, Ala., to be compressed, and was delivered to the Decatur Compress Company. The compress company afterwards shipped the cotton for account and

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Brief for appellee.

by the direction of appellants, Johnson, Nesbitt & Co., to some one of their customers who had purchased cotton from them. In January, 1900, the appellee railroad company paid Taylor and Co. for the twenty-six bales of cotton and Taylor assigned his interest in the claim to the appellee railroad company.

D. W. Speake, G. L. Jones and *S. R. Knox,* for appellants.

No right of action against Johnson, Nesbitt & Co. has been assigned by J. W. Taylor to the G. & C. R. R. Co. Only the cotton, or Taylor's interest in the cotton, had been assigned. The G. & C. R. R. Co., the assignee, had no right to sue for the conversion of the cotton, especially in its own name.

If the cotton had been converted to the use of Johnson, Nesbitt & Co., this conversion was made long before the assignment by J. W. Taylor to the G. & C. R. R. Co. There was no transfer of a right to the assignee to sue Johnson, Nesbitt & Co., or any third person.

The principle laid down in the case of *Gabbert* v. *Wallace,* 66 Miss., 618 and 624, is conclusive as to this position.

J. W. T. Falkner, for appellee.

Wrongdoers having converted property into money, the trespass or trover may be waived and assumpsit brought. *O'Conley* v. *City of Natchez,* 40 Am. Dec., 87; 1 Am. & Eng. Enc. Law (1st ed.), 888, sec. 11, 1 Smed. & M. (Miss.), 31; *Stormes* v. *Dillingham,* 54 Am. Dec., 88, 38 Am. Dec., 278.

Assumpsit will lie for money had and received, whenever one has money of another which he has no right to retain, but which *exacquo et bona* he should pay over to that other. This action had been greatly enlarged and now embraces all cases in which in justice and honesty plaintiff has equity and good conscience on his side, and defendant is bound by ties of natural justice and equity to refund the money. *Glasscock* v. *Lyon,* 83 Am. Dec., 299; *Lawson* v. *Lawshee,* 80 Am. Dec., 702.

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Syllabus.

The plaintiff has the right, therefore, in support of his contention to resort to and prove all equitable circumstances incident to his case.

Argued orally by *G. M. Jones,* for appellants.

CALHOON, J., delivered the opinion of the court.

If the appellee could have sued in his own name in trover under 26 Am. & Eng. Enc. Law (1st ed.), p. 755, and note to *Harker* v. *Dement,* 52 Am. Dec., 678, 679, it could waive the tort and sue for value, and averment and proof of the assignment by Taylor were unnecessary. But we think the evidence shows such assignment by Taylor of his interest as carried his right to sue, even if such right did not exist before. The case of *Gabbert* v. *Wallace,* 66 Miss., 618, 5 South., 394, is not similar to this. The case before us is not the case of assignment of debt secured by trust deed. We think the damages sufficiently shown.

Affirmed.

ADELE ROSENBAUM, GUARDIAN, *v.* MOSES ROSENBAUM ET AL.

PARTNERSHIP. *Dissolution. Contract. Construction.*

A contract between a retiring partner and his co-partners by which they agree to pay him the balance of a designated sum of money not required to satisfy certain firm debts which they might be "compelled to pay," and in which they agree "to make any defense that can be made" to said debts, does not forbid payment by the co-partners of said firm debts without suit, but leaves them free to pay what they were legally bound to pay and charge the retiring partner accordingly.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

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Statement of the case.

Adele Rosenbaum, guardian, appellant, was plaintiff in the court below; Moses Rosenbaum and another, appellees, were defendants there. From a judgment in defendants' favor plaintiff appealed to the supreme court.

Louis, Moses, and A. D. Rosenbaum were doing business in Meridian, Miss., as partners under the firm name of D. Rosenbaum's Sons. In 1893 Louis Rosenbaum was adjudged insane, and a guardian was appointed for his property. In August, 1894, the guardian of Louis Rosenbaum sold to Moses and A. D. Rosenbaum his interest in the business. The price agreed on for his interest was $3,000; $2,000 cash, and the remaining $1,000 was left in the hands of Moses and A. D. Rosenbaum to secure the payment of Louis Rosenbaum's part of certain specified debts. This contract was ratified by the chancery court. The agreement as to the $1,000 was as follows: "As to the remaining $1,000, whereas, the said firm has executed to R. Kahn its note for $3,000, against which note said firm claims setoff; . . . and whereas, the Meridian National Bank holds the note of said firm for $1,500; . . . and whereas, the said firm is indebted to the said bank in another note of about $200, and to the First National Bank in the sum of about $275: Now it is agreed that the party of the second part's (that is, the guardian of Louis) said $1,000 balance of purchase money aforesaid shall be held by said parties of the first part (*i. e.*, Moses and A. D. Rosenbaum), to be applied to his one-third of whatever sums of money the said parties of the first part may be compelled to pay on said debts to said banks and to said Kahn, above specified, and when said debts be settled, if all of said party of the second part's shall be $1,000 shall not be necessary to pay his one-third of said debts, then the party of the second part shall be paid by the parties of the first part the excess of said $1,000 remaining in the hands of the said parties of the first part after payment of the party of the second part's said one-third of said debts to said banks and the

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Brief for appellant.

said Kahn. The said parties of the first part agree to make any defenses that can be made to said debts." Adele Rosenbaum, guardian of Louis Rosenbaum, no part of this $1,000 having been paid, brought this suit against Moses and A. D. Rosenbaum, alleging in her declaration that no part of the $1,000 had been paid out under compulsion on any of the debts referred to in the agreement. To this declaration defendants pleaded the general issue, and gave notice thereunder that they would prove that they had paid certain sums of money on the debts referred to aggregating over $3,000, and that one-third of that amount was chargeable to plaintiff in extinguishment of plaintiff's claim. Upon this issue there was trial before a jury, which resulted in a verdict and judgment for defendants.

Fewell & Son, for appellant.

On the side of the appellant we have the solemn recital of the contract that the firm claimed offsets for more than sufficient to cover the amount appearing to be due to Mrs. Kahn's estate. This, we think, is to be considered a representation that some such offsets existed at the date of the contract, for the lunatic or his guardian could have had no knowledge as to such offsets; either that, or the latter was made to believe that such offsets actually existed. Such statements may well be considered to be an estoppel on appellees to deny wholly the then existence of such offsets, as the guardian must have acted on such representations. The statement of the contract is "against which note (of Mrs. Kahn) said firm claims offsets amounting to more than the amount appearing by said note to be due, but said firm apprehends some difficulty of making such setoffs good to the full amount of said note."

Now we ask the court to consider this question. Can the appellees be heard to deny that at that date, the date of the contract, there were offsets to the notes referred to? Can they say they were mistaken as to anything being then in existence by

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way of offsets to the Kahn note? They inferentially said there is no doubt we have offsets which will to some amount be good against this note. Will they be permitted to say that they then perpetrated a fraud, imposed a falsehood and a misrepresentation on the guardian of the lunatic? Obviously the guardian believed and acted on such representation; he made the contract on the faith of the genuineness of the claim of offset. The amount of the money left in the appellees' hands indicates that the parties acted on the supposition that there would be established some amount of offsets, for $1,000 would not otherwise cover one-third of the contingent liabilities mentioned in the contract.

A. S. Bozeman, for appellees.

The case was fairly submitted to the jury on the instructions of the court and there is no error in the granting of any instructions to defendants, or in modifying or refusing any instructions asked by the plaintiff. *Abbott* v. *Keith,* 11 Vt., 525, 528; *Green* v. *Disbrow,* 79 N. Y. 1, 9; *Burbank* v. *Slinkard,* 53 Ind., 495; *Ligonier* v. *Ackerman,* 46 Ind., 552; *Green* v. *Irving,* 54 Miss., 450, 454.

WHITFIELD, C. J., delivered the opinion of the court.

The chief point of contention between the parties to this suit is the proper construction of the following clauses in the contract: "Now, it is agreed that the party of the second part's said $1,000 balance of the purchase money aforesaid shall be held by said parties of the first part to be applied to one-third of whatever sums of money the said parties of the said first part may be compelled to pay on said debts to said banks and said Kahn, above specified, if all of said party of the second part's said $1,000 shall not be necessary to pay his one-third of said debts, then the party of the second part shall be paid by the parties of the first part, the excess of the said $1,000 remaining

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Opinion of the court.

in the hands of the said parties of the first part after payment of said banks and said R. Kahn. The said parties of the first part agree to make any defenses that can be made to said debts," etc. It will be observed that the debts being dealt with are not only the debts to the said banks, but also the debts to said R. Kahn. We think it was not intended by the terms of this contract, "compelled to pay," "to make any defense that can be made," construed in the light of the provisions of the contract we have quoted, and of all the other provisions of the contract, to require the defendants to pay only such claims as final judgment had been rendered for. The contention of counsel for appellant, if correct, when followed to its logical consequences, must mean that what the contract meant by "compelled to pay" was not that defendant should pay only after being sued, but only when final judgment should have been rendered. For mere suit would finally determine nothing; nor would the judgment of an inferior court; so that, upon this view, the defendants might be required not only to wait until they are sued, but to wait until after all trials, which might include appeals and reversals, and until final judgment should have been rendered in each case. This is a wholly impracticable construction, in view of the language of the whole contract and its evident purpose. What the defendants were legally bound to pay is what the contract meant, in our judgment. The other view imposes too great a burden upon defendants. Besides, it makes the execution of the contract practically impossible. The delays and the costs incident to the other view are quite as unfavorable to the appellant as to the appellee in any practical working out of the contract.

With this construction established, we cannot, in the light of the evidence, as maifestly viewed by the jury, find any ground for reversal. The facts were for the jury, and their verdict must be given its full weight as to what those facts establish. We cannot say that it is clearly wrong. And as to the criti-

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Statement of the case.

cism made of the instructions, they become unavailing when the contract receives the construction we have given it, and the verdict is given its true weight as to what the evidence does establish.

Affirmed.

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SAMUEL MACKMASTERS v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Confessions. Evidence. Inducements. Officers.*

A confession made to an officer, having the custody of the accused, after a statement by the latter to the former to the effect that he would tell the officer all about the crime if the officer would help him out, and a promise by the officer to do so, is inadmissible.

2. SAME. *Second confession. Presumption.*

When a first confession was not free and voluntary, but made under inducements or because of threats, subsequent confessions, although at the time they are made, no new inducement is offered or threat made, are not admissible in evidence unless clearly shown not to be attributable to the inducements or threats under which the first one was made.

FROM the circuit court of Tishomingo county.

HON. EUGENE O. SYKES, Judge.

Mackmasters, appellant, was indicted for the murder of his own father, Uriah Mackmasters. On his first trial he was convicted of manslaughter and appealed to the supreme court, where the conviction was reversed and the cause remanded for a new trial. See *Mackmasters* v. *State,* 81 Miss., 374.

A second trial was had and defendant again convicted of manslaughter, and he again appealed (this appeal) to the supreme court. The facts are sufficiently stated in the opinion of the court.

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Opinion of the court.

Candler & Sawyer, for appellant.

It is clear that the confession and its subsequent repetitions were superinduced by the reply of the deputy sheriff, Wallace Harvey, to the defendant when he asked him, "What would they do with a man for killing his daddy in self-defense?" A. "They will put you in the penitentiary for five or six years, and I will help you out."

J. N. Flowers, assistant attorney general, for appellee.

The confession of the appellant was before this court on the former appeal and the admission of proof of it was not declared to be error.

This is the same confession. It is freer from doubt, as now presented by several witnesses, than it was when made alone to Harvey.

Argued orally by *E. S. Candler, Jr.,* for appellant.

PRICE, J., delivered the opinion of the court.

Appellant was indicted for the murder of his father by the grand jury of Tishomingo county, convicted of manslaughter, and upon a former appeal to this court, 81 Miss., 374, s. c., 33 South., 2, the case was reversed and remanded. At the January term, 1903, of the circuit court, he was put upon trial for manslaughter, convicted, and sentenced for a term of twenty years in the state penitentiary. The state, over defendant's objection, introduced in evidence confessions made by the defendant while in the county jail, and before his trial. The question presented by this appeal is, were the confessions free and voluntary, under the law? The same point was raised when this case was before this court on the former appeal, but upon the first trial the defendant was introduced and testified, and, in substance, his testimony seems not to have been in serious conflict with the alleged confessions; but upon the record as now presented, the defendant was not a witness, and whether the

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confessions were free and voluntary now becomes one of material importance.

The appellant, his father, and his brothers were on bad terms—had carried guns and other weapons for each other. For a long while there had been serious trouble and some shooting between members of the family. Deceased was killed on Sunday night, October 27, 1901, within about four hundred yards of his own residence, and within about one hundred yards of the appellant's residence. When suspicion began to rest on appellant, he grew uneasy, and feared a mob from his own family; and while in jail, in care of the deputy sheriff, Wallace Harvey, at every opportunity he begged to be protected from the mob. His fears seemed not to be based upon the enormity of his crime, but upon the mere fact that one should ever be compelled to take the life of his father under any circumstances. There is no substantial evidence, aside from the confessions, to connect appellant with the killing. Wallace Harvey was the deputy sheriff, and attended the prisoner in the county jail; and, among other things, Harvey testified: "He was in jail, and sent for me to come down there. He wanted to see me. He sent for me a great many times. He told me if I would help him out he would tell me about this murder. I told him that I could not do anything for him more than I could do for him officially. He said he was afraid folks down there would mob him. I told him that he need have no fears of a mob; that I, as deputy sheriff, would protect him. He said that if I would see that he got bond, and if I would help him out, he would tell me. *Ques.*—What hope of reward, or fear of violence, did you hold out to him to make that statement? *Ans.*— He asked me, 'Do you reckon they would hang a fellow for killing his daddy in self-defense?' And I said, 'I don't know; they would be liable to send you to the pen for five or ten years.' He then said, 'What would you do? Would you help me out if they send me there?' I said, 'Yes; I would be

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Statement of the case.

willing to help you out myself.'" There were other confessions made subsequently, while in the jail, to one Mr. Lambert. Lambert had also talked to Harvey about the confessions. If the confession made to Harvey is not free and voluntary, then the subsequent statements to Lambert are tainted with the same inducements, and are to be attributed to the first cause moving the defendant to make the confession to Harvey, unless the evidence clearly shows otherwise. Under the decisions of this court it is clear that the confessions were not free and voluntary, and the objections made to their introduction in evidence should have been sustained. *Peter* v. *State,* 4 Smed. & M., 31; *Van Buren* v. *State,* 24 Miss., 516; *Simon* v. *State,* 37 Miss., 288; *Williams* v. *State,* 72 Miss., 117, 16 South., 296; *Whitley* v. *State,* 78 Miss., 255, 28 South., 852, 53 L. R. A., 402; *Ammons* v. *State,* 80 Miss., 593, 32 South., 9; *Ellis* v. *State,* 65 Miss., 44, 3 South., 188, 7 Am. St. Rep., 634.

Reversed and remanded.

JAMES W. CLARKE v. JOHN PIERCE.

INSTRUCTIONS. *Time for asking. Code* 1892, § 732.

If a jury, after retiring to consider of their verdict, request additional instructions, either party may thereupon present to the court proper additional written instructions and ask that they be given, and it will be error to refuse them on the ground that they were too late.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

Clarke, appellant, was plaintiff, and Pierce, appellee, defendant in the court below. After the case had been submitted and the jury had retired to consider of their verdict, they requested

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Brief for appellant.

the court to further instruct them. The plaintiff thereupon presented to the court a written instruction, and asked that it should be given; the defendant objected to the jury being further instructed, and the court below refused the instruction asked by plaintiff, alone because it was asked after the jury had retired.

W. T. Houston, for appellant.

The court's refusal to instruct the jury as requested by it, and as requested in writing by appellant, as to whether Westmoreland was the agent of appellee in and about the making of the horse trade, and as to whether he had authority to warrant the soundness of the appellee's horse, which he traded to appellant, was error.

When appellant so requested this instruction, the court was in session, the jury and appellee were present. The appellee objected and the court refused the instruction alone, because asked too late.

That the instruction was not asked too late, see 11 Am. & Eng. Enc. Pl. & Pr., p. 283, *et seq.*

Nor is there any law in our state fixing the time after which instructions cannot be given. Of course, with us they must be requested in writing. That was done in this case. The case of *Taylor* v. *Manley,* 6 Smed. & M., 305, does not militate against appellant's contention. There the court was not in session, as it was in this case; the parties were not present, as they were in this case; the instruction was not asked as it was here; the instruction was not given in writing, as required by statute. Nor is the case of *Randolph* v. *Govan,* 14 Smed. & M., 10, against appellant. There the instruction seems not to have been in writing, nor to have been requested. Nor does it appear that the court was in session.

F. V. Brahan, for appellee.

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court.

In respect to the right and duty of the court to give further instructions to the jury after they have retired, the principle is stated to be this in 2 Enc. Pl. & Prac., 283-285, inclusive: That the court may give the jury any instruction necessary to the accomplishment of justice in the case, at any time before the verdict is received, of its own motion; and, secondly, upon request of the jury; and, thirdly, that where the jury requests further instructions it is "not only the right, but the duty, of the court to reinstruct upon any question of law, arising from the facts proven, on which they say they are in doubt"; and, further, "that this practice is to be commended, since its results tend to a correct and rapid administration of justice"; and, lastly, it is there stated that by the weight of authority it is held that, although the court may have given further instructions at the request of the jury, it should also give additional instructions, by way of explanation or modification, if requested by one of the parties. In note 1 on page 283 of said volume the rule in Mississippi is set out. The cases of *Duncan* v. *State,* 49 Miss., 331; *Taylor* v. *Manley,* 6 Smed. & M., 305, and *Randolph* v. *Govan,* 14 Smed. & M., 9, are referred to. In *Duncan's Case* no request for instructions was made by either party, written or oral. In *Taylor* v. *Manley,* the court had adjourned for the day, and the judge, in the absence of both parties, and without their consent, at the request of the jury, gave them a charge. Under our practice, this was error, of course. In the case of *Randolph* v. *Govan,* there was no request by either party, but a request again by the jury. In our state, under Code 1892, section 732, the judge can only instruct the jury upon the principles of law applicable to the case at the request, in writing, of either party. Applying the principles which we have cited from the Encyclopædia of Pleading & Practice, the law in this state, under our practice, is that it is not only the right, but the duty, of the court, where the ends of

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Statement of the case.

justice so require, to give the jury, at any time before the verdict is received, any further instructions, which correctly state the law, that may be requested by either party in writing. The principles which we have quoted apply fully in this state, provided only the condition prescribed by our statute be complied with; that is to say, provided the instructions be requested by either of the parties in writing. If so requested in writing by either party, and if the instructions be correct, the objection of the other party is immaterial. The court sits to give the jury the law as it really is, as applied to the facts of the case, and it is not within the power of either party, by objecting, to prevent the court from giving such further charges, if they be correct, and if they be requested in writing by the other side. The additional charge asked in this case, in writing, by the plaintiff, was correct, on the facts of the case, and the court erred in not granting it.

Reversed and remanded.

GEORGE A. HAMMEL *v.* MARY P. ATKINSON.

UNLAWFUL ENTRY AND DETAINER. *Landlord and tenant. Stranger entering during term. Code* 1892, § 4461.

A landlord who has leased his land for a term and placed the tenant in possession cannot, during the term, maintain an action of unlawful entry and detainer, under Code 1892, § 4461, relating to that remedy, against a stranger who entered upon a part of the premises after the term began.

FROM the circuit court of Grenada county.

HON. WILLIAM F. STEVENS, Judge.

Hammel, appellant, was plaintiff, and Mrs. Atkinson, appellee, defendant in the court below. The action was unlawful

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Brief for appellant.

entry and detainer. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The facts are stated in the opinion.

W. C. McLean and *B. C. Adams,* for appellant.

We call the court's attention especially to the fact that while Hammel had rented the land in connection with other lands to Clarty, yet the land in controversy was not in the actual occupancy of Clarty. The land was not cleared; none of it was in cultivation, but on the other hand wild and unoccupied; in other words, there was no actual disseizing — there was no actual ouster by appellee of Clarty from the land. Those authorities which hold that the landlord cannot maintain in his own name the action of forcible entry and unlawful detainer are all based upon the fact that the tenant, and tenant alone, was the party whose occupancy was forcibly invaded; in other words, the authorities only go to the extent of holding that the tenant is the proper party to bring the action when he has been dispossessed of his ocupancy. No authority can be found which holds that the landlord cannot maintain the action where the lands are merely in the possession, as contradistinguished from the occupation, of the tenant. There is a vast difference between possession and occupation. The landlord, the true owner of the land, in contemplation of law, is always in possession of his land, even though the land be leased and is in the occupancy of his tenant, and the tenant is also in the possession of lands which he has leased from the true owner, but he may not be in actual occupation of the same. 13 Am. & Eng. Enc. Law (2d ed.), 751, says: "One who is in possession by agent or servant has such actual possession as will enable him to maintain the action," referring to quite a number of authorities. On page 752 of the same volume (and authorities referred to are the only ones which deny the right of the landlord to bring the action), it is said: "When the premises in question

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Opinion of the court.

are occupied by a tenant, such tenant must bring this action if the premises are forcibly entered upon or detained by third persons."

We call the attention of the court to the proposition that the premises must be occupied by the tenant. The property in controversy in this suit was not occupied by the tenant; he had no actual occupation; he was simply in constructive possession by virtue of the contract which he made with the landlord by which he was to work other lands.

The action of unlawful detainer is purely a statutory remedy; we look to the statute and to the statute alone. Section 4461 of the code gives the right of action to "anyone deprived of the possession of land by force, intimidation, fraud, strategem, stealth, etc." Now it may be true that the tenant, Clarty, whose possession was invaded, may have had the right to bring this suit, yet it does not follow that Hammel, the appellant, does not also have the right. It is submitted that under this statute, either the landlord or the tenant has the right to maintain the action; whenever the possession of the tenant is invaded it *ipso facto* invaded the possession of the landlord; the possession of the tenant is the possession of the landlord; and to oust the tenant is to oust the landlord.

The invading of the possession by Mrs. Atkinson clearly conferred the right to bring the action as it was held by this court in *Parker* v. *Eason,* 68 Miss., 290.

Horton & Horton, for appellee.

[The brief of counsel for appellee was lost, mislaid or withdrawn from the record before it reached the reporter.]

Argued orally by *B. C. Adams,* for appellant.

PRICE, J., delivered the opinion of the court.

This was an action of unlawful entry and detainer, under chapter 142 of the Code of 1892. Hammel had rented his place

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Statement of the case.

to Clarty, and Clarty was in possession of the land, making a crop. Mrs. Atkinson took possession of forty acres of this land, cleared up a small portion of it, and erected a house thereon. The only question presented by the record is, could the landlord bring this action against a third party while his tenant held possession of the land? The lower court held that he could not; that the tenant who held the possession under contract with Hammel should bring the suit. In this view we concur. At least the tenant in possession, before the expiration of his term, is a necessary party. 13 Am. & Eng. Enc. Law (2d ed.), 752.

Affirmed.

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VICKSBURG RAILROAD, POWER AND MANUFACTURING COMPANY v. FLORA WHITE ET AL.

EVIDENCE. *Mortality tables. Life expectancy.*

Mortality tables, not based on the general run of mankind, but made up from selected risks, persons, sound in body and mind, and of correct habits, do not prove the life expectancy of a person not shown to belong to the class from which the tables were made.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Mrs. White and others, appellees, were plaintiffs in the court below; the Vicksburg, etc., Company, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts upon which the decision is based are stated in the opinion of the court.

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Opinion of the court.

Smith, Hirsh & Landau, for appellant.

The court, notwithstanding the objection of appellant, permitted George T. Flannigan to testify concerning the expectancy of life.

The age of Flora White being forty-seven years, at the time of the death of Ike White, that was the proper age to be considered by the jury. Now the witness was directly asked, as shown, to give a man's expectancy of life. What should have been asked was the expectancy of life of the female, Flora White. Again, while the questions were confined to the expectancy of a man's life, commencing at the age of thirty years, there was no attempt made to show by any question asked, the expectancy of the two children of Flora White, to wit: Rosalie White, age fourteen, and Louis White, a male, age thirteen. If testimony of this sort is admissible at all, over the objection of appellant, certainly the expectancy of life of the parties to be benefited under the rule in the *Crudup Case,* should also be shown by proper and direct questions. The mere filing of tables of mortality, over the objection of appellant, will not cure the error. *Illinois, etc., R. Co.* v. *Crudup,* 63 Miss., 291.

Theodore McKnight, for appellee.

The mortality tables were clearly admissible in evidence. If there was a failure of proof to show any of the parties to be of the class from which the tables were made, this is not cause for reversal. The case stood as if the tables were never introduced, and of course it cannot be assumed that they misled the jury. Without the tables the jury, from the evidence as to age, etc., and from the appearance of the parties, could have rightfully determined their respective expectation of life.

Argued orally by *J. Hirsh,* for appellant.

PRICE, J., delivered the opinion of the court.

This case was before this court once before (31 South., 709),

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upon an appeal from a peremptory instruction given for the defendant below, and the case was reversed and remanded because this court was of the opinion that the question of negligence, on the facts shown, was one for the jury. The facts, as now presented by this record, do not change our former opinion on that subject. On the trial of this case in the court below, the plaintiffs, after showing the death of Ike White, showed that Flora White, his wife, and their children, aged twelve and fourteen, were his only heirs, and introduced, over defendant's objection, mortality tables showing the life expectancy of persons from thirty to fifty years of age; but there was no evidence of the life expectancy of the two children. It is further shown, and not disputed, in the evidence that these mortuary tables are made up by actuaries from a list of selected risks, persons belonging to an arbitrary class. It is further shown by the expert, Flannigan, that the tables are made up of persons of sound body and mind, having no physical defects or constitutional troubles, and of correct habits. The plaintiffs introduced no evidence to show that the deceased or any of the plaintiffs belonged to the class from which such tables are made; in fact, introduced no evidence of the physical, constitutional, and mental soundness of any of the parties. This being true, the appellant insists that the giving of the following instructions for the plaintiffs below was error, and furnished no guide for the measure of damages: "The court instructs the jury for the plaintiffs that, if they should believe from the evidence that the plaintiffs are entitled to recover, then, in estimating the actual damages sustained by plaintiffs by the reason of the death of Ike White, they may, as to the right of recovery on the part of the children of Flora White, take into consideration what would be the net earnings of Ike White during their minority, as they may believe the proof shows the said children might reasonably be expected to live, as they may believe is shown by the proof;

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and that as to the plaintiff, Flora White, they may, if they believe from the evidence that the plaintiff is entitled to recover, take into consideration in estimating the actual damages resulting from the death of Ike White, what would be the reasonable amount per year for the support and maintenance of the said Flora White for the number of years which a woman of her age, as shown by the proof, might reasonably be expected to live, as shown by the proof, unless they believe from the evidence that she would outlive the said Ike White. But if they believed from the evidence that he would die before her, then her damage should be calculated on the basis of his life."

This instruction was written upon the theory that the deceased or his wife had been shown by the proof to belong to the class of persons upon whom the mortality tables are based. In vol. 15 Am. & Eng. Enc. Law, p. 881, it is said that "the Carlisle, Northampton, or other mortality tables, together with the age and general health of the person, are admitted in evidence by courts for the purpose of showing what is the probable duration of life under peculiar conditions." These tables are compiled in connection with proof of the health, constitution, habits, etc., of the parties. These tables only show the probable age which a sound and healthy person belonging to the class may expect to reach, whose age is given. In *Railroad Co.* v. *Crudup,* 63 Miss., 303, this court, speaking through Justice Cooper, said: "In all cases of this character it must be the expectation of that one who would soonest die which should control." Who would soonest die in this case? The age is shown, but no evidence of the health, physical condition, and habits of the parties are given, placing them in the class of persons or selected risks, which is the foundation of the tables. The instruction assumes that Ike White would have lived until the children were of age. It also assumes that Ike and Flora White were of the class of persons contemplated by the tables. *Roose* v. *Perkins* (Neb.), 2 N. W., 715, 31 Am. Rep., 409; *City of Lincoln,* v. *Smith*

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Opinion of the court.

(Neb.), 45 N. W., 41; *Hunn* v. *Mich. Cent. R. Co.* (Mich.), 44 N. W., 502, 7 L. R. A., 500. In *Roose* v. *Perkins* (Neb.), 2 N. W., 715, 31 Am. Rep., 409, it was held that the foundation was properly laid for the introduction of the mortality tables, as the party was shown to be strong, healthy, and robust.

The third instruction is erroneous in basing the two children's damages upon the net earnings of the father and during their minority, as the proof shows that he might reasonably be expected to live, and, of course, assumes they will live, during such minority, or that Ike White would have lived during such minority. The instruction is erroneous in basing the damage of Flora White upon a reasonable amount per year for the support and maintenance for the number of years a woman of her age might be expected to live, as shown by the proof; erroneous because there is no proof in the record supporting the instruction that she had any life expectancy; erroneous in assuming that Ike White, the husband, had any life expectancy. It would have been sufficient to show the ages of the plaintiffs and the deceased, their condition of health and constitution, and left the jury to say how long they, or either of them, would likely live; but when one relies upon the mortality tables to show life expectancy it then becomes necessary to show that the party belongs to the class. The mortality tables are made from arbitrary rules, and the class is an arbitrary one, out of the general run of mankind, and one relying upon them must show that the parties come within the class of persons contemplated.

Reversed and remanded.

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Brief for appellee.

GEORGE SHORT v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Supreme court practice. Code* 1892, § 4370. *Objections must be seasonable.*

Exceptions in the trial court, not jurisdictional in their nature, must be seasonably made to prevent the application of Code 1892, § 4370, providing that a judgment in a criminal case shall not be reversed because of any error in the court below, unless the record show that the error complained of was made ground of special exception in that court.

2. SAME. *Want of arraignment. Arrest of judgment.*

An exception predicated of the fact that the defendant in a criminal case was not formally arraigned, not being jurisdictional, is not seasonably made if presented for the first time by a motion in arrest of judgment.

FROM the circuit court of Tishomingo county.

HON. EUGENE O. SYKES, Judge.

Short, appellant, was indicted, tried and convicted of burglary, and appealed to the supreme court. The opinion states the only facts necessary to an understanding of the opinion.

T. D. Young and *W. B. Ellis,* for appellant.

[The brief of counsel for appellant was withdrawn or lost from the record before it reached the reporter, hence a synopsis thereof could not be given.]

J. N. Flowers, assistant attorney general, for appellee.

The objection, for want of formal arraignment of defendant, cannot be considered in this court, because not made in the court below at the proper time. Code 1892, sec. 4370.

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Opinion of the court.

PRICE, J., delivered the opinion of the court.

The only point which we care to notice is this: The record shows that the defendant was not formally arraigned in the court below. The defendant, however, took no special exception, as provided in section 4370 of the Code of 1892, on this ground; that is, he took no special exception at the only proper time for taking such exception. He did move in arrest of judgment on this ground, but he had proceeded throughout the whole course of the trial without making the one of formal arraignment a ground of objection; he never once called the attention of the court below to the want of formal arraignment. If this had been done at any time during the progress of the trial before verdict, the defect could have been remedied. We held, in *Arbuckle* v. *State,* 80 Miss., at page 16, 31 South., 437, that arraignment is not jurisdictional, and the want of it is one of the defects cured by virtue of Code 1892, sec. 4370, unless special exception on that ground is made in the court below. We want to add just this further statement to what is there said: That all of the exceptions specially taken must be taken at the time proper for such exceptions to be made, looking to the nature of the exception. Applying that principle to this exception, it is plain that this sort of an exception must be made before verdict. Section 4370, Code 1892, has the wholesome effect of not only requiring a special exception to be made in the court below — if it is desired to avail of it here — but also of requiring each such special exception to be taken at the time proper for that exception to be made, looking to the nature of the exception. We speak, of course, of omissions or defects that are not jurisdictional in their nature; jurisdictional defects and omissions, as held in the *Arbuckle Case,* cannot be cured.

Affirmed.

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Brief for appellant.

WILLIAM L. TROWBRIDGE, MAYOR, ETC., OF VICKSBURG, v. FRANK A. SCHMIDT.

1. MUNICIPALITIES. *Demands. Statutes of limitations. Code* 1892, § 2755.

When a claim against a municipality becomes barred by the statute of limitations, it ceases to be a debt, under Code 1892, § 2755, providing that the completion of the period of limitation shall defeat and extinguish the right as well as the remedy, although by said statute it is further provided that the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.

2. SAME. *Duty of municipal authorities.*

It is the duty of municipal authorities to avail of the statutes of limitations as a defense to demands on the municipal treasury.

3. SAME. *Allowance of barred claim. Warrant. Mandamus.*

The allowance by municipal authorities of a demand which is clearly barred by limitation is without consideration and *ultra vires*, and mandamus will not lie to enforce the issuance of a warrant or to complete an imperfect one, on such an allowance.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Schmidt, appellee, was plaintiff in the court below; Trowbridge, mayor and treasurer of the city of Vicksburg, appellant, was defendant there. The suit was for a mandamus. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The facts are sufficiently stated in the opinion of the court.

Dabney & McCabe, for appellant.

The officers of the city are not authorized, as its trustees, to pay a claim which is barred by the statute of limitations. Both the right and remedy are lost where a claim is barred by the statute. Sec. 2755, Code 1892; 1 Dil. Mun. Corp., sec. 91,

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Brief for appellee.

pp. 17, 18; *Sykes* v. *Columbus,* 55 Miss., p. 137; *Adams* v. *Greenville,* 77 Miss., p. 881; *Beck* v. *Allen,* 58 Miss., pp. 143, 158, 159 and 160; *Ice Co.* v. *Adams,* 75 Miss., 415; *Spengler* v. *Trowbridge,* 62 Miss., 46.

It is said for appellee that the statute (sec. 16 of charter, p. 432, Laws 1884) is imperative and the mayor is without discretion in the matter, but this court has repeatedly held that any taxpayer could enjoin the illegal payment of the public money. 2 Dil. Mun. Corp., 906, 907, 908; *Beck* v. *Allen, supra.*

Henry, Scudder & Mulligan, for appellee.

The allowance by the city council was a legal and valid judgment in appellee's favor.

A municipality always had the inherent right to settle every suit or claim filed against it, as has an individual. 20 Am. & Eng. Enc. Law (2d ed.), 1146, note 8.

Trowbridge, as city treasurer, was only a ministerial officer. It was his duty to see that the warrants handed to him for his endorsement or approval had been ordered paid by the city council. Sec. 16, p. 432, Laws 1884, requiring that "all warrants issued by the city in payment of allowances made shall be presented to the treasurer of the city, who, if satisfied they are correct, shall write across the face thereof, 'approved,' and so sign his name thereon as treasurer," does not mean that the treasurer shall review the action of the board of mayor and aldermen as to the correctness or legality of an allowance, but means merely that the treasurer shall inspect the warrant for correctness, in so far as it fixes the amount, as it was allowed, and that it is made payable to the proper party. 2 Beach on Public Corporation, secs. 872, 876; *Reid* v. *City of Buffalo,* 2d Dil., sec. 859, note 3; *Bartlett* v. *Crozier,* 17 Johnson (N. Y.), 458, 439.

Mandamus lies to compel an officer to perform a duty neces-

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sarily imposed on him by the office he holds. *Pond* v. *Perrett*, 42 Conn., 13.

CALHOON, J., delivered the opinion of the court.

Schmidt's petition for mandamus sets forth that Vicksburg, in grading her streets, had damaged his real estate; that he applied to her municipal board for compensation, which was allowed, and $500 ordered to be paid to him, and the clerk issued the warrant, but that, by her charter, the treasurer had to approve and sign it, and give check for it on the city's bank of deposit, before the money could be had; and that the mayor, who was also treasurer, refused to do this; and the prayer is that he be compelled to do it, by peremptory writ of mandamus. The treasurer filed eight pleas to this petition, all of which were demurred to, and the demurrers sustained. We do not disturb this ruling as to the 1st, 2d, 4th, 5th, 6th, and 7th pleas, but concern ourselves with the 3d and 8th.

The third plea avers, in proper terms, that, when Schmidt filed his claim for allowance with the board, it was barred by limitation. The eighth plea sets up that the claim of Schmidt was for unliquidated damages for tort; that, more than six years after the tort, he brought suit on it in the circuit court, to which suit the city, as was its duty, pleaded the bar; that this suit is still undisposed of; and that pending it the claim was presented to and allowed by the board.

We have a statute (Code 1892, sec. 2755) as follows: "2755 (2685). *Completion of Limitation Extinguishes Right.*— The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon."

We find the following in Dillon on Municipal Corporations, vol. 1 (4th ed.), sec. 504 (412): "*Defenses.*—A municipal corporation *is not estopped,* after a warrant upon its treasury has

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been issued, to set up the defense of *ultra vires or fraud or want or failure of consideration.* And it may maintain a *bill in equity* to cancel warrants illegally issued. Taxpayers may enjoin the issue of illegal warrants or scrip." The italics are those of the text. It is indisputable that a municipal board cannot lawfully give away public money. It is certain, also, that a former liability extinguished by the bar of the statute of limitations is no debt. It follows that paying it is giving away public money, and this is *ultra vires,* and the treasurer may refuse to pay it. *Files* v. *McWilliams,* 49 Miss., 578; *Klein* v. *Board,* 51 Miss., 878.

No question of compromise payment appears in these pleadings. It will be time enough to settle that when it comes. It does appear, however, that a case is pending in the circuit court, and was when the allowance was made by the board, involving the very question of the bar of the statute of limitations here set up. *Board* v. *Arrghi,* 51 Miss., 667. There is no similarity between the case before us and the case of a claim within the power of the board to pay, and duly audited and allowed. It is the plain duty of a county or municipal board to plead the statute of limitations when it can, under the facts. Such boards are the people's trustees.

We think there was error in sustaining the demurrers to the third and eighth pleas.

Reversed and remanded.

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Brief for appellant.

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HENRY H. ROGERS v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Instruction. Self-defense.*

An instruction in a murder case is erroneous which denies defendant the right of self-defense, although he may have armed himself with a deadly weapon, intending to use it if necessary, and have been the aggressor in and provoker of the difficulty in which he killed deceased; the defendant had the right to abandon such intent and to show that the killing was not in pursuance of it.

2. SAME. *Instruction must be predicated of evidence.*

An instruction, in the absence of evidence of which to predicate it, is erroneous.

FROM the circuit court of Neshoba county.

HON. GUION Q. HALL, Judge.

Rogers, appellant, was indicted, tried and convicted of the murder of Thomas A. Byrd, and sentenced to the penitentiary for life, from which conviction and sentence he appealed to the supreme court. The facts are sufficiently stated in the opinion of the court.

Southworth & Hughston and *S. A. Witherspoon,* for appellant.

There is no element of malice in any of the facts alleged in the instruction. The parties could have armed themselves, as stated, for a lawful purpose. It is not unlawful for parties who have trouble to arm themselves for the purpose of facing each other unless their purpose, in arming themselves, is to use their weapons in the meeting to overcome their adversaries. Defendant may have armed himself for the purpose of defending himself from a threatened attack; he may have armed himself out of abundant caution, with no intention of using the

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Brief for appellee.

weapon except in necessary defense of his life and limb; and no court can gainsay this right. Yet this instruction tells the jury to find defendant guilty of murder, if, under the circumstances, he shot and killed Byrd, whatever may have been the intent and purpose in arming himself, or whatever may have been the necessity which prompted him to take life, or whether the taking of the life was pursuant to a design previously formed. The court in giving this instruction must have had in mind the law against duelling or mutual combats, but the instruction fails to state the essential ingredients of mutual combats.

The weapon must not only be secured for a meeting, but it must be procured for a combat in which he intended to use it to overcome his adversary if necessary. *Long* v. *State,* 52 Miss., 23; *Prince* v. *State,* 73 Miss., 838; *Lofton* v. *State,* 79 Miss., 723.

Again, there is no evidence that there had been any trouble or misunderstanding between Byrd and Rodgers prior to that meeting.

The second instruction for the state is misleading. It fails to state the essential ingredients of murder.

The killing must be pursuant to a previous design to kill to constitute murder, and that intent must not be abandoned at any time before the killing. *Long* v. *State,* 52 Miss., 23; *Prine* v. *State,* 73 Miss., 838; *Fore* v. *State,* 75 Miss., 727; *Patterson* v. *State,* 75 Miss., 670; *Pulpus* v. *State,* Mss. April 6, 1903.

J. N. Flowers, assistant attorney general, and *Woods, Fewell & Fewell,* for appellee.

The "duel instruction" cannot possibly have done the acused any harm. It is an attempt to define a duel and to announce the law of the case as declared in *Thomas* v. *State,* 61 Miss., 60. But there were eight other instructions given for the state and eighteen instructions given for the defense, and considered

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Opinion of the court.

as a whole, they are correct and not even calculated to mislead the most unlearned of juries.

It is to be said that the word "duel" cannot be found in the instruction. It was a simple charge upon the law where two men agree to face each other about an angry and irreconcilable dispute, and arm themselves for the meeting, and do accordingly meet armed and with their hands upon the weapons during the meeting, and one draws and kills the other. Is it not the law that a killing under such circumstances is murder?

Argued orally by *S. J. Witherspoon,* for appellant.

PRICE, J., delivered the opinion of the court.

The grand jury of Neoshoba county, March 8, 1902, indicted H. H. Rogers for the murder of Thomas A. Byrd, and on December 23, 1902, he was tried, convicted, and sentenced to life imprisonment; and the case is here on appeal, with a record challenged by the defendant with forty-four assignments of error. We will consider but one of the numerous errors assigned, in so far as it relates to two charges given for the state — Nos. 2 and 5.

Charge No. 2 is in the following language: "If the jury shall believe from the evidence, beyond all reasonable doubt, that, in the difficulty in which Byrd lost his life, that the defendant was the aggressor and provoker of the difficulty, and that he prepared himself for it by arming himself with a deadly weapon, to wit, a pistol, and sought out the deceased and provoked the difficulty, intending to use his pistol and overcome his adversary, if necessary, and that he then shot and killed Byrd, he is guilty of murder, and the jury should so find."

This instruction charges the jury, in substance, that if they believe that the defendant was the aggressor and provoked the difficulty, and armed himself for it, and sought out Byrd, intending to use the pistol and overcome Byrd, if necessary, and

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that he then killed Byrd, he is guilty of murder. This charge is erroneous, in that it denies the defendant the right of self-defense. All the facts assumed or alleged in the instruction may be true, and yet the killing may not have been in pursuance of such former design, or it may have been done in necessary self-defense.

The fifth instruction given for the state is as follows: "If the jury shall believe from the evidence, beyond all reasonable doubt, that there was trouble or misunderstanding at the time of the homicide between Byrd and Rogers, and that they agreed to face each other about it, and that, in pursuance of the purpose to meet and face each other, each of them armed himself with a deadly weapon, to wit, a pistol, and that they then met and faced each other, and that Rogers in that meeting shot and killed Byrd, he is guilty of murder, and the jury should so find."

This instruction told the jury that they should convict Rogers of murder if they believed there was trouble or misunderstanding between Rogers and Byrd at the time of the homicide, and that they agreed to face each other, and each armed himself with a pistol, and that they did so face each other, and Rogers killed Byrd at the meeting. The error in this instruction is too manifest for argument or citation of authorities. There is no evidence in the case on which to base such a charge. There is no evidence that the parties had agreed to such a meeting. The preliminary negotiations of the friends and relatives of the unfortunate girl, and the part played in this effort to get matters amicably adjusted, by Rogers, were all consistent with a lawful purpose. Such a meeting as subsequently took place between Rogers and Byrd, in which Byrd lost his life, falls far short of a prearranged meeting for a duel. In the one case the meeting was to adjust a misunderstanding, and remove, if possible, all stain from the character of the girl.

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Syllabus.

But in the other all efforts towards peaceable settlement are known to have passed, and the parties meet only to do battle.

The state asked nine instructions, and, as is usual in such cases, falls an easy victim to too many instructions. "The old paths are the best paths." As said by this court in *Patterson* v. *State,* 75 Miss., 675, 23 South., 647, by Judge Whitfield: "Persons at their country's bar are not to be charged into the penitentiary by a court as a matter of law, but to be put there by verdicts of juries, finding their guilt as a fact." A circuit judge can hardly keep a *nisi prius* trial free of error where counsel, unconsciously swayed by their interest in the case, demand so much at his hands, and at a time when both time and opportunity preclude an examination of the authorities. *Prine* v. *State,* 73 Miss., 842, 19 South., 711; *Patterson* v. *State,* 75 Miss., 675, 23 South., 647.

Reversed and remanded.

EMMA O. JOHNSON v. JACOB H. JONES.

HUSBAND AND WIFE. *Code* 1892, § 2293. *Family supplies. Agency of husband. Scope extended. Wife's conduct.*

A wife (being under our constitution fully emancipated from all disability on account of coverture, constitution 1890, § 94) may by her conduct extend the scope of her husband's statutory agency as limited by Code 1892, § 3293, providing that where, without a written recorded contract between husband and wife changing the relation, the husband carries on business with the means of the wife, such business shall be held to be on her account by the husband as her agent, and making her liable to persons dealing with him without notice for debts contracted in the course of such business.

FROM the circuit court of, second district, Panola county.
HON. PERRIN H. LOWREY, Judge.

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Brief for appellee.

Jones, appellee, was plaintiff and Mrs. Johnson, appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The facts are sufficiently stated in the opinion.

A. W. Shands, for appellant.

The peremptory instruction asked by appellant should have been sustained. The burden of proof was upon the plaintiff to show what items of the account were furnished for the plantation and what for the house, and upon being interrogated as to each item he replied as to each that he did not know for what purpose it was bought, and does not know where it was used. *Porter* v. *Staten,* 64 Miss., 421.

The record nowhere shows that Mrs. Johnson, appellant, ever agreed to be liable for any of this account, and though section 2293, Code of 1892, makes her liable for the plantation supplies it extends to nothing else, and it appears from the record that part of these items were not plantation supplies, and she is not liable for the supplies furnished to support, feed, and clothe the family of H. M. Johnson unless she expressly ordered or knew that the goods were being sold upon her credit and does not dissent. The record does not show that she ever had an intimation that this was being done until a few days before the bringing of this suit, some two years after most of the items on the account were bought. *Caldwell* v. *Hart,* 57 Miss., 123; *Porter et al.* v. *Staten,* 64 Miss., 421.

L. F. Rainwater, for appellee.

The uncontradicted testimony was that the credit was extended solely to the wife and that appellee looked to her for payment, knowing that the husband was insolvent.

The case is on "all fours" with *Gross* v. *Pigg,* 73 Miss., 286, and *Ross* v. *Baldwin,* 65 Miss., 570. Counsel for appellant in the court below predicated his request for instructions on the case of *Porter* v. *Staten,* 64 Miss., 421. The latter case is un-

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Opinion of the court.

like the two former and unlike the case at bar in this: In *Porter* v. *Staten,* the wife was held liable as an undisclosed principal. In the case at bar and in *Ross* v. *Baldwin* and *Gross* v. *Prigg, supra,* the wife was not an undisclosed principal, but was known to be the owner, and the credit was extended to her.

The wife in the case at bar is liable not only because the statute, Code 1892, sec. 2293, makes her husband her agent, but for the further reason that by a course of dealing she had made him her agent in a broader sense.

PRICE, J., delivered the opinion of the court.

Jones was a merchant doing a general mercantile business in the town of Courtland. Mrs. Emma O. Johnson was the wife of H. M. Johnson, who managed and cultivated his wife's plantation during the year 1890, when the account sued on was made by H. M. Johnson with Jones for plantation and family supplies. There was no contract between Johnson and wife in evidence as to the farming operations. The husband, with the wife's means, had carried on her farming operations for a period of several years; and Jones had for several years sold family and plantation supplies, and charged them on his books to H. M. Johnson. H. M. Johnson was insolvent, and Jones had no notice that the husband was farming on his own account. For the years 1898 and 1899 the husband had gathered the crops from the plantation, and applied them to the account, without objection on the part of his wife, who lived in the town of Courtland, and was often in and about the store and purchased a portion of the goods, and had knowledge of the transactions. Statements of the account were rendered from time to time, in which the goods were charged to both husband and wife. The undisputed testimony was that the credit was extended to Mrs. Johnson, and that Jones looked to her for payment. Johnson had wage hands making the crop, and they were fed from his table. The defendant introduced no testi-

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mony. From a judgment of $159.79, Mrs. Johnson appeals to this court.

Counsel for appellant relies upon *Porter et al.* v. *Staten,* 64 Miss., 421, 1 South., 487. In that case the wife was held liable as an undisclosed principal, and her liability limited to the debts contracted for the purpose of carrying on the business in which her means (the plantation) was used. But in this case the wife does not occupy the position of an undisclosed principal, but was known to be the owner of the farm, and the credit was extended to her, the husband being insolvent. Under section 2293, Code 1892, the wife is liable for supplies sold to the husband when he takes charge of her plantation as her agent, and makes crops upon it and buys supplies without any contract with her as provided in the section, changing the agency thus created. Within the scope of such agency are embraced family supplies. *Gross* v. *Pigg,* 73 Miss., 286, 19 South., 235. As the wife is under no disability to contract, she may, by her conduct or course of dealing, and through the agency of her husband, extend her liability beyond the scope of sections 2293 of the Code of 1892. *Ross* v. *Baldwin et al.,* 65 Miss., 570, 5 South., 111.

Affirmed.

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Statement of the case.

WESTERN UNION TELEGRAPH CO. v. MARGARET PEARCE.

1. TELEGRAPH COMPANY. *Delay in delivering messages.*

A telegraph company which wrongfully delayed the delivery of a message from a wife to her husband announcing the illness of a child and requesting the husband's immediate return home, is liable to the wife for its negligence, where the delay resulted in the husband's failure to return as soon as he would have done had the message been promptly delivered.

2. SAME. *Special damages. Pregnancy. Want of notice.*

Although a telegraph company failed to seasonably deliver a message from a wife to her husband, she cannot therefor recover an item of special damage which resulted alone from the fact that she was pregnant, in the absence of evidence that the company had notice of her condition.

FROM the circuit court of, second district, Yalobusha county.
HON. SAMUEL C. COOK, Judge.

Mrs. Pearce, appellee, was plaintiff and the Telegraph Company, appellant, defendant in the court below.

This suit was to recover $1,950 actual damages and the statutory penalty of $25 from the Western Union Telegraph Company for failure to promptly deliver a telegraph message sent by plaintiff from Water Valley, Miss., to her husband, at McComb City, Miss. Mr. Pearce lived in Water Valley, but he was temporarily at McComb City at work, boarding at McColgan's hotel there. The message was as follows: "Water Valley, Miss., 16th of March, 1901. F. A. Pearce, at McColgan's hotel, McComb City, Miss.: Come home at once. Baby is sick. (Signed) Margaret Pearce." This message was written on a piece of white note paper, and sent to the telegraph office in Water Valley about 6 o'clock in the afternoon of the 16th of March, 1901, and its transmission paid for. It was delivered to Mr. Pearce in McComb City, about 12 o'clock, March 17,

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Brief for appellant.

1901, and he left that place for home on the first train, about 9 o'clock that night. If the telegram had been delivered promptly Pearce would have caught an earlier train and reached home several hours before he did. The declaration alleges that plaintiff was pregnant, expecting to be confined in about a month; that plaintiff's previously born child became ill, and its life was despaired of, while she was in that condition; that plaintiff was greatly worried and troubled, and deprived of the presence and comfort of her husband's companionship at that time, and his care and counsel and his services in nursing the child, and her strength was taxed beyond her ability by the care and responsibility of nursing the sick child, of which she would have been relieved by the presence of her husband, whereby she became sick and suffered great mental and physical pain, and the child with which she was pregnant was caused to be prematurely born, and died within a few hours afterwards. It is conceded that the defendant company had no knowledge of Mrs. Pearce's condition. It had no notice of the extent of the sickness of the previously born child, further than what was disclosed by the message, and no knowledge of any of the circumstances upon which the claim for special damages is based. There is no evidence to show whether the delay was in the delivery of the message at McComb City or delay in the transmission. There were verdict and judgment for plaintiff for $650. Defendant's motion for a new trial was overruled, and it appealed to the supreme court.

R. H. Golladay and *Mayes & Harris,* for appellant.

The message refers to baby's sickness alone. Neither from it nor any "extraneous information" could any one, plaintiff not excepted, have foreseen or reasonably anticipated her alleged injuries as a result of delay in delivery of message. *Clifton's Case,* 68 Miss., 309; *Jacob's Case,* 76 Miss., 278; *Johnson's Case,* 79 Miss., 60, 1.

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Brief for appellant.

If it be assumed, firstly, that possibly Pearce, had he received the message before 8 P.M. of the 16th, would have left McComb's on the train at that hour and arrived in Water Valley at 4.15 A.M. of the 17th; and, secondly, that had he got home at 4.15 A.M. of the 17th he'd have averted the stings and arrows of outrageous fortune, that, on that day smote his wife, the plaintiff, the assumption does not help plaintiff.

Possibilities or conjectures will not sustain a verdict. *Cathey's Case,* 70 Miss., 332, 337, 338, 339; *Woolley's Case,* 77 Miss., 927, 924; *Johnson's Case,* 79 Miss., 58, 61.

Because in his absence, *ergo,* because of his absence, is "unsound as evidence or argument."

Though negligence be *causa sine qua non,* if not *causa causans,* the immediate proximate cause of the injury, a defendant is not amenable for the injury. *Crawley's Case,* 70 Miss., 343, 344; *Wharfboat, etc.,* v. *Wood & Co.,* 64 Miss., 661; 675 *et seq.; Meyer* v. *King,* 72 Miss., 1, 7, 8, 9; *Railroad Co.* v. *Millsaps,* 76 Miss., 855, 857, 858; *Railroad Co.* v. *Woolley,* 77 Miss., 927, 943; *Railroad Co.* v. *Rooks,* 78 Miss., 91, 97.

There can be no presumption indulged that a penalty has been incurred.

There is no evidence in this case from which it can be inferred that the company did not promptly deliver the message after its arrival in McComb City. *Marshall* v. *Western Union Tel. Co.,* 79 Miss., 154.

The court will see that all of the testimony offered of any facts upon which to base the claim for special damages were excluded from the jury.

In the first place, the court excluded from the consideration of the jury the fact of the plaintiff's pregnancy, it being conceded by counsel for the plaintiff that the telegraph company had no knowledge whatever of the plaintiff's condition. This action of the court was unquestionably right.

Furthermore, the court excluded from the jury the testimony

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Brief for appellee.

of Mrs. Pearce, the plaintiff, on the point that her husband, if at home, could have relieved her of the responsibility of nursing. The court, by an instruction, excluded from the consideration of the jury any mental anxiety or suffering by the plaintiff. What was there left in the case then upon which a verdict could possibly be supported?

It has been expressly decided by this court that in the absence of either language in the message, or some extraneous information of the facts, upon which special damages would arise, a recovery cannot be had. *Tel. Co.* v. *Clifton,* 68 Miss., 307.

Kimmons & Kimmons, for appellee.

The damages in this case are not too remote, but are the direct and proximate cause of the injury. The appellee needed rest because of the conditions in her home. She got no rest because of the fact that her husband was away. On account of the negligence of the company, her husband was away, so the absence of her husband is the cause of the injury.

In the case of *Alexander* v. *W. U. Tel. Co.,* 66 Miss., 161; s. c., 67 Miss., 386, Alexander sent a message to his real estate agent, saying: "Get option until Monday if you can, if not, close trade and fix papers." There was no offer on the part of anybody to sell Alexander the land, but simply a statement from the agent that the land could be bought, and the proof showed that the land could have been bought at that time, and would have been bought if the telegram had been delivered within a reasonable time, and the court held that the company was liable. The purpose of Alexander's telegram was:

1. To secure action of the agent.

2. If the agent had acted, he would have secured a bargain in real estate.

3. By the failure to secure the bargain he lost money.

In the case at bar, the purpose of the telegram was:

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Opinion of the court.

1. To secure the presence of appellee's husband.

2. His absence caused overexertion and much care to appellee.

3. Overexertion caused weariness and suffering, physical and mental.

Certainly the damages are no further removed in the case at bar than in the Alexander case, and it will not be said that the law of a commercial transaction is entitled to more consideration at the hands of our courts than physical and mental suffering caused by the failure of appellant to deliver a telegram notifying the head of the home of domestic cares and troubles.

It was contended in the court below that it was the overexertion that caused the trouble of appellee, and so it was, but the overexertion would not have been endured if the telegram had been sent promptly. *McPeet* v. *W. U. Tel. Co.*, 107 Iowa, 366; s. c., 43 L. R. A., 214.

Argued orally by *J. B. Harris,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

It is plainly proved by the testimony, taken as a whole, that all the suffering, physical and mental, endured by the appellee, was due solely to her advanced pregnancy; she being eight months gone. She is not suing for damages caused by nursing her own child, but because she was not in condition, by reason of said pregnancy, to nurse her child at all. The proof shows clearly that she did suffer great anguish of mind and physical agony—so much so that she lost the child of which she was *enciente;* but, while this is true, it is also true that the court excluded from the jury all the proof showing that her suffering, both mental and physical, was due to said advanced pregnancy. The court excluded all evidence of pregnancy, to which the physical and mental suffering the appellee herself says was wholly due. This out of the case, there was nothing left on which to base a finding for special damages, and we think the

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Opinion of the court.

court was clearly right in excluding this proof. The appellant had no notice whatever of said pregnancy, and the damages flowing from that are plainly not damages within the contemplation of the parties at the time the contract was made. The damages to be recovered must be such as can fairly be said to have been reasonably within the contemplation of the parties at the time it was made. It is true that Eugene Horton told the operator that the dispatch should be sent right away, and it is also true that it showed on its face that the matter was urgent; but neither of these pieces of testimony in any way showed that the pregnancy of appellee was in any way whatever known by the appellant. We are therefore of the opinion that no special damages can be recovered in this case. The case cited by learned counsel for appellee (*McPeet* v. *Western Union Tel. Co.*, 107 Iowa, 366, 78 N. W., 63, 43 L. R. A., 214, 70 Am. St. Rep., 205) is plainly sound on its facts. Indeed, the quotation by counsel from it includes the statement: "It is not too strict a rule to hold the defendant responsible for such losses as may be reasonably anticipated to follow its negligence, whether informed definitely what these may be or not." It cannot be said that the telegraph company in this case knew, or was put in possession of any facts by reason of which it would be bound to know, that the appellee was pregnant. But the appellant was plainly negligent, and is clearly liable for the price of the message, at all events; and, if the proof could show on the new trial that the delay was in delivering the message after it reached its destination, she will be entitled to recover the penalty prescribed by the statute.

Reversed and remanded.

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CORNELIUS W. DIGGS *v.* CHARLES J. INGERSOLL.

ACCOUNTING. *Reference. Misconduct of master. Electric methods.*

Where a master, appointed to state an account involving business transactions, covering a period of more than six years, makes his report less than one day, and apparently within two hours after the reference, his proceeding is too hasty to be productive of wholesome results, and his report should not be accepted by the court in the absence of evidence that due care and deliberation were given the subject.

FROM the chancery court of Issaquena county.

HON. A. MCC. KIMBROUGH, Chancellor.

Ingersoll, appellee, was complainant, and Diggs, appellant, was defendant, in the court below. From a decree in complainant's favor defendant appealed to the supreme court. The opinion states all the facts necessary to its understanding.

Green & Green, for appellant.

Henry & Scudder, for appellee.

[The briefs of counsel were not with record when it reached the reporter's hands.]

WHITFIELD, C. J., delivered the opinion of the court.

This case must be reversed in order that a proper accounting may be had. The reference to the master, the investigation—if it could be called an investigation—made by the master, his report, and the confirmation of his report, all occurred on the same day, and apparently within the space of a couple of hours, and yet the dealings covered a period of more than six years. The appellant avers that the rate of interest charged him was usurious, that the prices charged him for goods were extortionate, that he had been denied credits which he should have received, that he has not been fully credited with all payments

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Statement of the case.

made, and that the payments made were not credited to the proper debts. Without expressing any opinion on these various matters, it is perfectly clear that no investigation worthy of the name could have been made in the time given it in the court below. A full and complete investigation of all these matters should be made. Electric methods are not usually productive of wholesome results in judicial proceedings.

Reversed and remanded.

82 494
83 482
83 826

BUTTERFIELD LUMBER COMPANY *v.* FRANK H. HARTMAN.*

PUBLIC LANDS. *Revised Statutes of United States*, §§ 2290, 2291 *and* 2296. *Contracts to sell timber. Public policy.*

An agreement by a homesteader who has entered public land from the United States with a third person, that in consideration of the latter's advancing him money to complete the entry and obtain the patent, he would sell such person the timber on the land, is not against public policy, and the subsequent sale of the timber after the issuance of the patent in pursuance of the agreement is valid. Revised Statutes of the United States, §§ 2290, 2291, and 2296 considered.

FROM the chancery court of Lincoln county.

HON. HENRY C. CONN, Chancellor.

The Butterfield Lumber Company, appellant, was complainant, and Hartman, appellee, was defendant in the court below.

In November, 1892, Esau Harness received a patent from the United States government to a certain tract of land in Lincoln county as his homestead. Before the entry was perfected, Harness entered into an agreement with the Norwood & Butterfield

* This case is approved in the following cases to be reported in 83 Miss., viz: *Sanford* v. *Eastabuchie Lumber Co.; Anderson* v. *Wilder*, and *Orrell* v. *Bay Manufacturing Co.* The subject is elaborated and the principle extended in the case last named.

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Brief for appellant.

Company to sell it all the pine timber on the land, and also a right of way 100 feet wide over the same, and in pursuance of this agreement Harness and his wife, on January 28, 1893, after the issuance of the patent, executed a deed to Norwood & Butterfield Company conveying the pine timber on the land and a right of way, and this deed was filed for record February 10, 1893. In 1900 the Norwood & Butterfield Company conveyed the timber on said lands and the right of way to the Butterfield Lumber Company, appellant. On January 30, 1893, Esau Harness and his wife gave a deed of trust on the land to Hartman, appellee, and this deed of trust was recorded January 31, 1893. In December, 1894, the land was sold under this deed of trust, and was purchased by Hartman.

Appellants filed a bill in the chancery court against Hartman, seeking to have the deed of trust to Hartman and the trustee's deed to him canceled in so far as it conveys the pine timber on the land and the strip of 100 feet for a right of way. The bill alleges that Hartman had actual notice of the contract between the Norwood & Butterfield Company and Esau Harness, and the deed conveying the pine timber and right of way. On this last point, which was denied in defendant's answer, considerable testimony was taken, but it is not deemed necessary to set it out. On the final hearing the court below denied the relief sought and dismissed the bill, and the complainant, appellant, appealed to the supreme court.

Thomas Brady, Jr., for appellant.

The appellant's vendor in this case secured a deed to the pine timber, and a right of way across the land upon which it is situated. Two days later the appellee secured a deed of trust on the land, upon which the timber was situated. The next day he hurried it upon record, before appellant's timber deed had been filed for record, and now the appellee claims timber, right of way, and land under a trustee's deed.

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Brief for appellee.

If appellee has title to the timber and right of way, it arises under the registry acts and not by reason of the intrinsic value of the deed of trust, or trustee's deed. The appellee was told before he secured his deed of trust upon this land by its owner, Esau Harness, and by witness Coon, that the timber thereon had been sold and conveyed to appellant's vendor.

That appellee had sufficient knowledge to put him on inquiry and to lead to the requisite fact, is shown by his employing witness W. C. Coon to defeat the sale under the contract of which he had been advised.

The appellee in this transaction coveted the appellant's timber, and with this spirit, like Jacob of old in displaying hairy hands, sought Esau's birthright.

P. Z. Jones, for appellee.

The contract made between Harness and Norwood & Butterfield Company was in violation of the homestead laws of the United States, and the appellants come into court with unclean hands. The pretended contract was made while the land was owned by the government of the United States. Norwood & Butterfield Company were to furnish the money and Harness was to do the swearing and the government was the victim.

It is not pretended that Hartman was told anything about the timber deed, and if Hartman had followed out the information given him, as claimed, he would have ascertained not that a valid contract existed between Harness and Norwood & Butterfield Company, such as courts of law and equity would enforce, but that a conspiracy existed between them to defraud the government.

The testimony for the complainant touching notice to Hartman is unsatisfactory and far from convincing. It is all denied by Hartman and he is fully corroborated by disinterested witnesses.

The determination of this case in the lower court depended entirely on a question of fact.

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Opinion of the court.

The inquiry here is not whether his finding is correct, but is it manifestly wrong? *Fox* v. *Matthews,* 33 Miss., 433; *Derdeyn* v. *Donovan,* 33 So. Rep., 652.

CALHOON, J., delivered the opinion of the court.

We are driven to the conclusion that the decree of the court below must have been the result of an opinion that the agreement between Esau Harness and the grantor of appellant that, in consideration of the advance money to perfect his homestead entry and get his patent, Esau would sell the timber on the land in controversy, was against public policy and void, and made void also the subsequent sale of the timber to reimburse for that advance. We are not in accord with that view. Rev. St. U. S., secs. 2290, 2291, 2296 (U. S. Comp. St. 1901, pp. 1389, 1390, 1398), with Gould & Tucker's notes, vol. 1, p. 537. On the testimony we cannot escape the conviction that the appellee had such notice as should put any reasonable man on inquiry, which would have disclosed the existence of the conveyance of the timber and right of way by Esau to the grantor of appellants.

Reversed, and decree here in accordance with the prayer of the bill.

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Statement of the case.

SAMUEL STANLEY v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Poisoning food, drink, etc. Code* 1892, § 1255. *Corpus delicti. Confession. Evidence.*

Under Code 1892, § 1255, making it a crime to mingle poison with any food, drink or medicine with intent to kill or injure any human being, the *corpus delicti* is the mingling of the poison with the food, drink or medicine, and the same cannot be proved alone by the confession of the accused.

FROM the circuit court of, second district, Carroll county.

HON. WILLIAM F. STEVENS, Judge.

Stanley, appellant, was indicted, tried, and convicted under Code 1892, sec. 1255, of having mingled poison with water, with intent thereby to murder one Heggie.

The statute is as follows: *Poisons — Mingling Poisons with Food, Drink, or Medicine, Poisoning Spring, Well, Reservoir of Water,* etc.—Every person who shall mingle any poison with any food, drink, or medicine with intent to kill or injure any human being, who shall willfully poison any well, spring, or reservoir of water, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both."

The indictment charges that Samuel Stanley did "willfully, feloniously, and maliciously mingle poison, the kind unknown to the grand jurors, with the food and drink of A. L. Heggie, and other persons unknown, with the intent and in the attempt then and there, of his malice aforethought, to kill and injure the said A. L. Heggie, and other persons to the grand jury unknown."

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Opinion of the court.

McClurg & Gardner, for appellant.

The *corpus delicti* in this case was not proved, save by the confessions of the accused, if at all, and of course the peremptory instruction to find for defendant ought to have been given. *Osborne* v. *State,* 64 Miss., 320. The peremptory instruction ought to have been given for divers other reasons mentioned in the motion for a new trial.

J. N. Flowers, assistant attorney general, for appellee.

The indictment in this case was a good one, and the demurrer to it was properly overruled. *Taylor's Case,* 74 Miss., 547.

In regard to the confessions this court will not presume that the confessions were extorted. There is sufficient evidence in the record to establish appellant's guilt beyond a reasonable doubt. The instructions given by the court, taken as a whole, are correct, and it is manifest from the record that appellant had a fair and impartial trial.

CALHOON, J., delivered the opinion of the court.

The *corpus delicti* cannot be proved by the confession of an accused person. Without the confession in the case at bar there is no proof of it. The *corpus delicti* here is the mingling of poison with water. The water was bitter, and was spit out without harmful effect. It is not shown that there was poison in it, althought the water in the bucket was at hand.

Under *Osborne* v. *Sate,* 64 Miss., 320, 1 South., 349, this case must be *Reversed and remanded.*

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Statement of the case.

GEORGE JENKINS v. STATE OF MISSISSIPPI.

1. INTOXICATING LIQUORS. *Procuring for inebriate. Knowledge. Code* 1892, §1594.

Knowledge is not of the essence of the offense created by Code 1892, § 1594, making it unlawful to procure intoxicants for one in the habit of becoming intoxicated.

2. SAME. *Indictment. Surplusage.*

If it be charged in an indictment for such offense that the accused knew that the person for whom the intoxicants were procured was in the habit of becoming intoxicated, and that the accused was not his parent or guardian and did not stand in *loco parentis* to such person, the averments are surplusage and need not be proved.

3. SAME. *Actual delivery.*

It is unnecessary to prove in such case that the defendant actually delivered the intoxicants to the inebriate for whom they were procured, since one can procure an article for another without making the actual delivery.

FROM the circuit court of Tishomingo county.

HON. EUGENE O. SYKES, Judge.

Jenkins, appellant, was indicted, tried, and convicted, under Code 1892, § 1594, of procuring intoxicants for one Brown, a person in the habit of becoming intoxicated, and appealed to the supreme court.

The proof was that Jenkins and Brown lived in Iuka, Miss., near the Alabama line, and Brown gave some money to Jenkins to buy whisky with, and Jenkins went to Cherokee, just over the state line in Alabama and bought the whisky, and started back to Iuka with it, but before he got into Mississippi he handed the jug of whisky to a boy on the train for safe-keeping,

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Brief for appellee.

and did not take it into his actual custody any more. When he reached Iuka he was arrested, and some whisky he had was taken from him, and the jug he had bought for Brown was also gotten by the officer from the boy, and was never delivered to Brown at all. The proof also shows that Brown was in the habit of becoming intoxicated.

Candler & Sawyer, for appellant.

Under section 1594, Code 1892, to sustain a conviction for "procuring whisky for a person in the habit of becoming intoxicated," it must be shown that the whisky was delivered to the person for whom it was obtained. The word "procure" has more in it than the mere fact of one person getting whisky into his possession for another. It also includes the delivery of the whisky to the person for whom it was obtained who is in the habit of getting drunk, as he is the person the statute was passed to protect, and no injury can be done him unless the whisky is delivered to him. In this case, the whisky was never delivered to Brown, the person in the habit of getting drunk.

Further, there is no evidence in the record that Jenkins was not the guardian, etc., of Brown. Having alleged that, the state must prove it; criminal statutes must be strictly construed.

Further, appellant never had the whisky in his possession in Mississippi. He bought it from a licensed dealer in Alabama and put in possession of a boy in Alabama and never had it himself any more.

J. N. Flowers, assistant attorney general, for appellee.

Section 1594 of the Code of 1892 makes it a crime to procure liquor for one who is in the habit of becoming intoxicated. Counsel for appellant contend that the crime was not completed until the liquor is delivered to the person for whom it was intended.

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Opinion of the court.

The criminal act is done when the liquor is procured for the unlawful purpose; procuring is the act condemned by the statute. It may be true that in such case the inebriate does not suffer, but the law punishes for crime whether any individual has suffered or not. The criminal act has proceeded well on its way when the liquor has been obtained for the person in the habit of becoming intoxicated, with his money, and the accused has been prevented from going further and delivering the goods only by the timely interference of an officer who arrests him for the crime he has committed.

It was not necessary under the statute to allege in the indictment that accused was not the guardian or in *loco parentis* to the one for whom the liquor was procured.

CALHOON, J., delivered the opinion of the court.

The indictment is drawn under the concluding clause of code, sec. 1594. That whole section is in these words:

"Sec. 1594. If any person, whether having license to retail liquors or not, shall sell any vinous, alcoholic, malt, intoxicating or spirituous liquor, or intoxicating bitters or other drink which if drunk to excess will produce intoxication, in any quantity to any person in the habit of becoming intoxicated, to any Indian, or to any minor, or, not being *a parent, guardian, or in loco parentis to the minor,* shall *procure* such liquor, bitters or drink *for a minor,* or shall procure the same for an Indian, or for a person in the *habit of becoming intoxicated,* he shall, on conviction, be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or both." (Italics ours.)

It is true that the indictment reads: "Did unlawfully procure vinous and spirituous liquor for W. S. Brown, knowing the said Brown to be in the habit of becoming intoxicated, not then and there being the parent and guardian of said Brown, nor in *loco parentis* to said Brown, etc." The word "knowing"

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is pure surplusage, knowledge being not at all essential to the offense. The other words underscored in the above copy of the statute are also useless and immaterial, since they refer to minors only, as will be seen by reading the whole of section 1594. Here there is no charge that Brown was a minor, and no pretense that he was in the evidence. So we repudiate the view that a new trial should be had because there is no evidence to show negatively that Jenkins was not parent, guardian, or in *loco parentis* to Brown. The words do not involve such a description of the offense as to compel proof.

Neither do we subscribe to the contention that the offense is not completed if the liquor is not actually delivered to the drunkard. One of the definitions given by Webster of the word "procure" is "to acquire or provide for one's self or for another." Jenkins was provided by the inebriate with money to buy in Alabama, just across the line, and bring to him the liquor. Jenkins accordingly bought it in Alabama, and brought it to Mississippi for delivery to Brown, when he was arrested. It is idle to say he did not bring it to Mississippi. True, he gave it, for some purpose of his own, easily to be surmised, to a boy on the train for notice and safe-keeping. But he came with it on that same train, and was the real custodian. The boy was his mere instrument.

Affirmed.

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Brief for appellants.

WILLIAM H. SLAYDON ET AL. v. WILLIAM T. MCDONALD.

PLEADINGS. *Circuit court. Judgment for want of replication. Waiver.*

A motion by defendant for judgment for want of replication to a plea is waived if not called to the attention of the court until after the introduction of all the evidence and the presentation of a motion by plaintiff to exclude the defendant's evidence.

FROM the circuit court of Hancock county.

HON. JAMES H. NEVILLE, Judge.

McDonald, appellee, was plaintiff in the court below; Slaydon and another, appellants, were defendants there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The facts are sufficiently stated in the opinion of the court.

W. J. Gex, for appellants.

Of course, to try a case without an issue would have been error under the common law. Stephens on Pleadings and Shipman's Common Law Pleadings. The very question has been so well settled in our state that we need go no further than our own reports. *Buck* v. *Mosley,* 24 Miss., 170; *Steele* v. *Palmer,* 41 Miss., 88; *Armstrong* v. *Barton,* 42 Miss., 506; *Porterfield* v. *Butler,* 47 Miss., 165.

Harper & Harper, on same side.

The statute of Jeofails, sec. 746, Annotated Code of Mississippi, 1892, was intended to cure the defects of judgment where issue was not joined after verdict; and this court has repeatedly held that this enactment is to be construed always to read

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after verdict, and does not nor cannot apply to anything before verdict.

Bowers, Chaffee & McDonald, for appellee.

Both parties announced themselves ready. Plaintiff stated his cause of action to the jury, the defendants stated their reply, and the plaintiff in turn stated his replication, these statements being, of course, oral, and the case, without objection, went to trial on the issues thus joined, in the presence and hearing of the jury. No objection whatever was made until after the defendant's evidence had closed and was about to be excluded.

Pleadings are to be made before the trial and where the defendant goes to trial without any formal replication being filed to his affirmative plea, and all of the facts set up in his plea are inquired into, it is too late for him, after he has experimented with the sufficiency of his defense, and finds himself confronted with the probable exclusion of his evidence, to object for the first time to a lack or want of formal reply to his pleas, the truth of which he has just failed to sustain.

In *Naron* v. *Gwin,* 43 Miss., 346, the court declined to reverse a judgment on a case submitted to a jury without a plea on the ground that the defendant had suffered no hurt, and in doing so reversed a long line of cases to the contrary.

CALHOON, J., delivered the opinion of the court.

Florian Seal, Fred W. Eaton, and E. L. Lawrence owned the steamboat Demopolis — each an undivided one-third interest. On February 18, 1902, Florian Seal and Fred W. Eaton conveyed their two-thirds interest to the appellant, W. H. Slaydon; it being then understood that Slaydon was to pay two claims against the boat — one, of $500, with interest, to a bank, and another, of $91, to Florian Seal, one of the vendors of the two-thirds interest. On March 13, 1902, Seal having had to pay the bank, Slaydon, to evidence his debt for the bank debt and

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Opinion of the court.

interest and the $91, executed, with appellant Henry Egart as co-maker, a promissory note of that date, payable sixty days thereafter, to the order of Florian Seal, for $603.50, which Seal indorsed in blank, and which fell into the hands of the appellee, W. T. McDonald, in due course of trade, as must be assumed. McDonald sued Slaydon and Egart, the two makers, who pleaded that the consideration for the note had failed as to $375.55, which sum was made up of debts of the boat other than those which Seal had represented as all the boat owed, and that he had agreed that he himself would pay any other debts, and that Slaydon had to pay and did pay these other debts, and credit as setoff is claimed. No replication was ever filed to this plea, and this presents the only question in the case; there appearing to be no mutuality in the setoff, and that Slaydon had paid the debts mentioned in the plea between February 18, 1902, when Slaydon got his bill of sale to the boat, and March 13, 1902, when he made the note sued on. Now, the record shows that a jury was impaneled and accepted by the parties, and that the counsel stated their respective contentions to the jury, and plaintiff's evidence and defendants' evidence were offered, and then counsel for plaintiff moved to exclude all of the evidence for defendants. At this period, before the court acted, counsel for defendants, for the first time, announced that they had a motion which they desired to present, which was on the motion docket, but not before called to the attention of the court. This motion was for judgment for defendants for want of replication to their plea as setoff. The court properly overruled this motion at this stage of the proceedings, especially as defendants had had the benefit of the plea by stating their contentions to the jury, and the evidence showed there was nothing in them. We feel sure that no case can be found, with the same presentation exhibited by this record, holding adversely to our conclusion.

Affirmed.

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Brief for appellant.

SOPHRONIA MURDIN v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Deadly weapons. Carrying concealed. Code* 1892, §§ 1620, 1027. *Threats. Instruction.*

Where the evidence on the trial of an accused for carrying a deadly weapon concealed, under Code 1892, §§ 1026, 1027, regulating the subject, showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed.

FROM the circuit court of Adams county.

HON. JEFF TRULY, Judge.

Mrs. Murdin, appellant, was charged, tried and convicted for carrying a deadly weapon concealed, and appealed to the supreme court. The opinion sufficiently states the facts.

Charles F. Engle, for appellant.

From the five witnesses introduced by appellant to prove the threats made against her it appears strongly, firmly, clearly that if there ever can be a case in which a person is justified in carrying concealed weapons it was in this case.

The fourth instruction of the state disregards entirely the defense interposed by appellant. The defect was not cured by the instructions given for appellant. To the jury two conflicting propositions were presented. The instruction for the state should have gone further and stated "unless they further believe that she had been threatened with a serious attack by an enemy and did so apprehend such an attack," or words to like effect.

Going to the jury, as it did, containing the bare and naked statements that if she carried the pistol concealed she is guilty, certainly misled the jury to the great injury of appellant.

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Opinion of the court.

J. N. Flowers, assistant attorney general, for appellee.

A judgment will not be reversed by this court because in an instruction for the state a defense interposed by the accused is ignored if the instructions for the defense correctly state the law. *Skates* v. *State,* 64 Miss., 644.

WHITFIELD, C. J., delivered the opinion of the court.

The only instruction given for the state is fatally erroneous. It is true that in *Skates* v. *State,* 64 Miss., 644, 1 South., 843, 60 Am. Rep., 70, the court held that it would not reverse, because the whole body of instructions taken together announced the law correctly, although one of the instructions for the state ignored a special feature of the defense; but that is not our case. This offense created by statute has by the same statute an exception named, which, if it exists, makes the party not guilty though he should carry the weapon concealed; and yet the state asked but one instruction, and attempting, by that instruction, to define the offense, told the jury to convict appellant upon proof merely that she carried the weapon concealed, although there was testimony clearly showing — if the jury believed it — that she carried the pistol because of the threats that had been made against her and communicated to her. It is true, one or two of the witnesses who testified to threats said they never told her until after the trial in the court of the justice of the peace, and there would be some force in the argument for the state that she could not therefore have carried the pistol because of threats of which she had not heard, if the case rested on the testimony of these witnesses. But, as stated, other witnesses testify that they had heard threats, and communicated them to her, before she carried the pistol. On this state of the evidence the charge for the state — especially when only one is given — should have contained the qualification that she was not guilty if she carried the pistol because of the

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Brief for appellant.

communicated threats; otherwise, the jury were left at large as to the law.

Reversed and remanded.

CHRISTOPHER FOOSHEE v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Seduction. Chastity of woman. Code* 1891, § 1298.

Under Code 1892, § 1298, making it a crime to seduce a woman over sixteen years of age by virtue of any feigned or pretended marriage or false promise of marriage, the previous chaste character of the woman is an essential element of the crime.

2. CRIMINAL PROCEDURE. *Absent witness. Attachment. Not found.*

The return of "not found" on an attachment for an absent witness does not necessarily warrant the denial of a continuance on account of his absence.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Fooshee, appellant, was indicted, tried and convicted for the seduction of Zora McGreger, under Code 1892, § 1298, and appealed to the supreme court. The opinion states the case.

Mitchell & Mitchell, for appellant.

The court below should have granted a continuance. The indictment was filed on the 11th of December, and the trial began on the morning of the 12th. This was too short a time to obtain the presence of the witness Swain, a most important witness for the accused. A temporary absence of the witness from his home only a few hours doubtless caused a return of "not found" on the compulsory process. There was reasonable ground for believing that this witness could be secured at a

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Opinion of the court.

subsequent term of the court, hence the application for a continuance should have been granted. 3 Am. & Eng. Enc. Law, 809.

J. N. Flowers, assistant attorney general, for appellee.

There are no facts in the record upon which this court could base a reversal. There is no way to tell whether the trial judge did right or wrong. No proof was taken, or if there was, the record does not show it. It will be presumed that the witness Swain could never be had, since the facts he was expected to swear to would force any man to leave.

The trial judge was acquainted with the situation, and with the parties, and this court will presume that he acted correctly.

Argued orally by *John H. Mitchell,* for appellant, and by *J. N. Flowers,* assistant attorney general, for appellee.

PRICE, J., delivered the opinion of the court.

On December 11, 1902, the grand jury of Pontotoc county returned an indictment against appellant for seduction. At two o'clock on the same day the defendant was arraigned, and the state announced, "Ready for trial." The defendant was not ready for trial, but made an application for a continuance on account of an absent witness, Jim Hitchcock.

Defendant's application for continuance:

"State of Mississippi, Pontotoc county. Circuit court, December term, 1902. *State* v. *Christopher Foshee.* Personall appeared before me, R. B. Patterson, clerk of the circuit court of said county and state, Christopher Foshee, the defendant in the above cause, who, being first by me duly sworn, on oath says that he cannot safely go to trial at this term of the court on account of the absence of the witness James Hitchcock, who was duly subpœnaed for defendant in this case. Defendant expects to prove by said witness that the woman, Zora McGreger, whom defendant is alleged to have seduced, told said

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Opinion of the court.

witness, after the alleged seduction happened, that the defendant was not at all to blame in the matter with which he is charged in this case, and that the defendant had not done to her any more than other boys had done before. Defendant states that he knows of no other witness by which these facts can be proved; that said matter is very material and important; that said witness is within the jurisdiction of this court, and has been present in court during every day of this term until the present; that said witness is not absent by the consent or procurement of said defendant; that this affidavit is not made for the purpose of delay, but in order that justice may be done. Christopher Fooshee.

"Sworn to and subscribed before me this 11th day of December, 1902. R. B. Patterson, Clerk."

Indorsed: "Filed December 11th, 1902. R. B. Patterson, Clerk."

The application was overruled, and the case set for trial at 8.30 the following morning. When the case was called for trial December 12th the absent witness, Hitchcock, had appeared; but the defendant made the following application for a continuance, by way of amending his original application, and on account of the absence of Benjamin Swain:

"Case called Friday morning, December 12, 1902, at 8.30 o'clock. The witness, Hitchcock, was present, and here counsel for the defendant asked to amend their motion for a continuance on account of a witness (Benjamin Swain) being absent, and he is a very material witness for the defendant, and the defendant wishes to prove some important facts by the witness, the said Benjamin Swain, and counsel for defendant believes that this witness can be had at the next term of this court.

"Amendment to affidavit for continuance.— Defendant expects to prove by this witness, Benjamin Swain, that said witness had sexual intercourse with Zora McGreger prior to the time that she alleges that the defendant seduced her; that

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Opinion of the court.

defendant knows of no other witness by whom he can prove the above fact; that said witness resides in the county, is a householder and permanent resident of this county; that he has been in this county during the term of court; that defendant expects and confidently believes that the attendance of this witness can be procured by the next term of this court, and therefore moves the court for a continuance."

The application for continuance was overruled in the following language, defendant excepting: "And it appearing to the satisfaction of the court that said witness, Benjamin Swain, had been duly served with process of the court, and attachment having been issued and returned 'Not found,' it is therefore considered by the court that, having exhausted the process of this court, said defendant's motion for continuance be, and the same is hereby overruled." To which action of the court in overruling said motion the defendant then and there excepted in open court. The case at once proceeded to trial, and resulted in a verdict of guilty, and the appellant was sentenced to one year in the state penitentiary.

There were thirty witnesses examined in this case, most of whom testified that either the prosecutrix's reputation for chastity was good at and prior to the date she was seduced, or that her reputation for chastity was bad. There was evidence tending to show many indiscretions, boldness, undue familiarity with men, but nothing criminal.

This brings us to a consideration of the proposition, was it error to overrule this application for a continuance, and force the defendant to trial without the witness, Benjamin Swain? Code 1892, § 1298, is as follows: "If any person shall obtain carnal knowledge of any woman, or female child, over the age of sixteen years, by virtue of any feigned or pretended marriage or any false or feigned promise of marriage, he shall, upon conviction, be imprisoned in the penitentiary not more than

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Opinion of the court.

five years; but the testimony of the female seduced alone shall not be sufficient to warrant a conviction."

The prosecutrix was a single woman over the age of sixteen years, and under the statute quoted, as construed in *Norton* v. *State,* 72 Miss., 128, 16 South., 264, 18 South., 916, 48 Am. St. Rep., 538, her previous chastity was essential to conviction. The application, as amended, in the light of the court's reason for overruling it, conformed to the essential requirement. The court gave as his reason for overruling the motion that process had been duly served upon the witness, and attachment had issued and was returned "Not found." We are unwilling to subscribe to the doctrine that when the defendant has shown due diligence, and where application is timely made, where the witness resides within the county, and has been duly served with process, and an attachment issued for the witness, and returned "Not found," and all this within one day, it exhausts the power and process of the court in such cases, especially in view of the fact that the defendant was indicted on the 11th, and tried on the following day. As the chastity of the prosecutrix was material and necessary to conviction, evidence of former acts of unchastity was very material evidence. The absence of the witness from his home for only a few hours on business or otherwise would easily account for his not being reached by compulsory process; but even should the witness, desiring not to testify against his partner in crime, have fled, certainly the defendant should not be prejudiced thereby. The case could have been continued without hurt to the state. *Scott* v. *State,* 80 Miss., 197, 31 South., 710; *Solomon* v. *State,* 71 Miss., 571, 14 South., 461; *Strauss* v. *State,* 58 Miss., 53; *Jones* v. *State,* 60 Miss., 117.

Reversed and remanded.

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Brief for appellant.

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ELIHU BLAU v. STATE OF MISSISSIPPI.

CRIMINAL PROCEDURE. *Grand jury. Influenced by court. Indictment quashed. Code* 1892, §§ 120, 1121. *Dealing in futures.*

It is sufficient ground for the quashal of a subsequently returned indictment (under Code 1892, §§ 1120, 1121, making it a crime to deal in futures) that the grand jury sought to be finally discharged without indicting defendant and the court refused to discharge them, and thereupon instructed them specifically touching the criminal character of defendant's business, saying that the law was plain and the court of opinion that they had sufficient evidence to find an indictment, that other grand juries had indicted, and that the business in which defendant was engaged was a flagrant violation of the statute.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

Blau, appellant, was indicted, tried and convicted, under Code 1892, §§ 1120, 1121, for dealing in futures, and appealed to the supreme court. The facts upon which the case was decided are fully stated in the opinion.

R. F. Cochran and *S. A. Witherspoon,* for appellant.

If the court has the lawful right to compel a grand jury to return indictments, when they have refused to do so, then the bill of rights and constitution should be annulled and the grand jury system abolished. *Clair* v. *State,* 28 L. R. A., 367; 2 Hale, P. C., 161; 1 Chitty on Criminal Law, 312.

The trend of judicial sentiment in this country is illustrated by the language of Justice Field, of the supreme court of the United States, who, in charging the grand jury in the year 1872, said it was "designed as a means of not only bringing to trial persons accused of public offenses upon just ground, but also as a means of protecting the citizens against unfounded

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Opinion of the court.

accusation, whether it comes from government or be prompted by partisan passion or private enmity." 2 Sawy., 669.

There are not many cases on the question of inflammatory or prejudicial charges to the grand jury, the judges generally recognizing the propriety of defining the duties of the grand jury in calling their attention to crimes generally, and then to particular statutes, but refraining from expressing any opinion as to the guilt or innocence of any particular person. But it is believed that any intimation by the court that a particular person has been guilty of any particular crime, or that evidence can be easily found which will convict them, or that the grand jury should indict them, would vitiate an indictment, if proper objection is taken, except in Louisiana.

A motion was the proper proceeding to raise the question of the validity of the indictment. Code 1892, § 1355.

J. N. Flowers, assistant attorney general, for appellee.

Argued orally by *R. F. Cochran* and *S. A. Witherspoon,* for appellant, and by *Monroe McClurg,* attorney general, for appellee.

PRICE, J., delivered the opinion of the court.

The appellant was indicted by the grand jury of Lauderdale county January, 1902, for violating sections 1120, 1121, of the Code of 1902, against dealing in futures. The defendant filed the following motion to quash the indictment against him:

"And now comes the defendant, in his own proper person, and moves the court to quash the indictment herein, and in support of said motion he assigns the following reasons:

"First. Because the Hon. G. Q. Hall, judge of the tenth judicial district, at the January term of the circuit court, 1902, charged the grand jury at length on the criminal character of the business of this defendant, and the grand jury, after being in session two or three weeks, and after having examined

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numerous witnesses touching the character and kind of business in which the defendant is engaged, failed, after a full investigation, to indict the defendant, and the said grand jury, after finishing the work before it, made its final report to the court, and asked to be discharged, and thereupon the court refused to receive their report, and had the grand jury seated, and proceeded in a lengthy charge to again specifically charge the grand jury in reference to the criminal character of the business engaged in by this defendant.

"Second. Because the Hon. G. Q. Hall, judge of the tenth judicial district, in said second charge to said grand jury, among other things, said to the grand jury: 'I don't know why it is you have not returned indictments against these parties (meaning this defendant). The law is plain and clear, and you have had, I understand, sufficient evidence before you to find indictments. The business has been outlawed in every state in the Union, so far as I am informed, except perhaps in New York and Louisiana. It is like a poker game, where the owner of the poker table has a "rake off," no matter who wins or loses, and it is demoralizing to the manhood of the community. Previous grand juries indicted some of these parties, and they immediately drew their money out of the banks and fled from the state. The cases have not been tried yet, but I will attend to them in due time. They do not deliver, and make no pretense of delivering, a bale of cotton, and the business is a flagrant violation of the statutes which I have read to you. If you do not indict these parties (meaning this defendant), this town will be overrun with bucket shops before another grand jury meets.'

"Third. Because the said grand jury, after the said judge had delivered the said second charge, and being influenced and induced to indict this defendant by reason thereof, returned the indictment herein, which was not the voluntary act of the grand jury. It is therefore void.

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Opinion of the court.

"Fourth. For other reasons to be assigned at the hearing. E. B. Blau, by A. S. Witherspoon and R. F. Cochran, attorneys.

"Filed July 9, 1902. D. W. Cameron, Clerk."

The defendant then and there offered to introduce evidence to prove the facts set out in the motion, but the court stated that it did not care to hear proof, as the facts stated in the motion were substantially true, and were substantially stated in the charge of the court to the grand jury as alleged in the said motion; but the court denied said motion and overruled the same, to which ruling and decision of the court the defendant, by his counsel, then and there excepted.

"And because the matters aforesaid do not fully appear of record the defendant presents this his bill of exceptions, and prays the same may be signed and sealed by the judge of this court, pursuant to the statute, etc., which is accordingly done. G. Q. Hall, Judge.

"Filed July 18, 1902. D. W. Cameron, Clerk."

This motion was overruled in the following words: "This cause coming on to be heard upon motion of defendant to quash the indictments herein, and the court, having considered the same, doth order that said motions be overruled and denied. To which action of the court the defendant then and there excepted," and filed his special bill of exceptions.

Should this motion to quash have been sustained? If this question be answered in the affirmative, a consideration of the numerous other errors assigned will be unnecessary. This presents to some extent a new question in this state. In *Allen* v. *State*, 61 Miss., 627, there was a plea in abatement alleging that one or more of the grand jurors were intoxicated when the bill was found. This court held, in an opinion by Justice Chalmers, that the grand jury is not under the guidance and control of the court, like the petit jury is, while considering their verdict, and should not be so judged. In *Durr* v. *The State*, 53 Miss., 427, this court sustained the motion to quash

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the indictment because the attorney assisting in the prosecution by leave of the court went before the grand jury with witnesses and acted for the district attorney in framing the indictment. In *Welch* v. *State,* 68 Miss., 341, 8 South., 673 (opinion by Justice Campbell), a plea in abatement was sustained because the attorney for the prosecution procured himself to be secured as a witness before the grand jury, and, thus introduced, addressed the grand jury, urging them to find an indictment. The court held that, while illegal or insufficient evidence before the grand jury will not be inquired into, yet improper influence to secure the indictment should be. "In vain the constitution protests against being proceeded against criminally, by information, for an indictable offense, except in the cases mentioned, if grand juries are to be swayed by malice or prejudice, or subjected to other influences than those recognized by law as legitimate and proper to guide them in their secret inquest. 'The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies.'" In *Wilson* v. *State,* 70 Miss., 595, 13 South., 225, 35 Am. St. Rep., 664, this court said: "Immunity from persecution for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all other states; and though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial, nor that it is as essential before the one body as the other that private ill will or malevolence shall be excluded." It is said by Thompson & Merriam on Juries, at page 569, that "in the struggles which at times arose in England between the powers of the king and the rights of the subjects, the

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grand jury often stood as a barrier against prosecution in the king's name, until at length it came to be regarded as an institution by which the subjects were rendered secure against the oppression from unfounded prosecution of the crown." And at page 651 the same authority says "that in certain respects the grand jury is to be considered as enjoying a distinct autonomy; that, after they have been organized and charged, part of their legal function is to be performed by them as a separate and independent body, acting by themselves, and apart from the court. The court is neither the keeper of their conscience nor can control it in finding facts, but in many other respects they are, of course, subject to the control of the court, and dependent upon it for the execution of powers necessary to the prosecution of their inquiries. The ancient practice of forcing grand juries, by fines and imprisonment, to find indictments against their convictions, is now among civilized nations regarded as one of the barbarities of the common law, and to attempt anything of the kind now would be criminal. The grand jury may at all reasonable times during the discharge of their duties appeal either to the court or the prosecuting attorney for advice, but this advice must be restricted to matter of law, sufficiency of service, and proper dispatch of the public business. Neither the court nor this officer can say to the grand jury that the facts, as shown by the evidence, are sufficient to authorize them to find a bill. As upon a trial by a petit jury the judge cannot say that they should return a verdict of guilty, so here the court cannot advise them upon the question of a true bill or not a true bill." In volume 17 (2d ed.) Am. & Eng. Enc. of Law, p. 1273, we find the text: "The court, in charging the grand jury, should not undertake to tell that body that there is evidence warranting it in indicting parties for the violation of particular laws, nor otherwise invade the province of the grand jury." The same doctrine is laid down in *Clair* v. *State,* 40 Neb., 534, 59 N. W., 118, 28 L. R. A., 367, and it is a recent,

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well-considered case, with exhaustive notes. It is there said "that a finding by the grand jury necessarily includes two elements: First, the *corpus delicti;* second, the finding that the offense named was committed by the person charged. Both the facts named must be found by the grand jury, and cannot be dictated by the court." But in the case we have under consideration, after the grand jury had been in session for weeks, heard all the witnesses concerning the defendant's business, made their final report, and asked to be discharged, without finding a bill against the defendant, the court refused to accept the report and discharge them, but proceeded to give them a special charge. He charged that the crimes had been committed, and that the defendant was the guilty party; that they had sufficient evidence before them to find indictments; and then the grand jury retired, and involuntarily returned an indictment against the defendant, charging him with dealing in futures. This is just the thing that Sir Matthew Hale sought to prevent when he said: "The privilege of an Englishman is that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard if every justice of the peace, or commissioner of oyer or terminer, or gaol delivery, may make the grand jury present what he pleases," etc. Justice Field, of the supreme court of the United States, in charging a grand jury in 1872, said: "A grand jury was designed as a means of not only bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity."

These authorities show the trend of judicial sentiment in this country. "The grand jury stands as the great inquest between the government and the people; the bulwark between enmity, hatred, and ill-will on the one side and justice and fair-dealing between man and man on the other; a fortification

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that shelters the innocent against every assailant, and protects the people against every crime. Standing as a co-ordinate branch of our criminal jurisprudence, . . . influence its findings by courts, officers, or laymen, and you pave the way to influence its deliberations by corrupt means. You place the entering wedge, which goes to the foundation of the liberties of the people. If the court has the right to compel the grand jury to return an indictment after that body has refused to do so, then that body loses its independent function, the purposes of its establishment, the confidence of the people, and should be abolished."

After a careful examination of the authorities, we fail to find any reported case where it was so clearly undertaken to dictate to and coerce from the grand jury an indictment. In directing the attention of the grand jury to particular offenses or classes of offenses, to crime and the necessity of suppressing it, a very large, necessary, and useful discretion is conferred upon the presiding judge, and this court will not undertake to control that discretion unless manifestly abused. In this case the court has gone too far. We must keep "that body" pure, its findings unaffected by power, fear, sympathy, or public sentiment. In that way only can it protect the rich, the poor, the humblest, and the greatest in the land alike.

Motion to quash should have been sustained.

Reversed and remanded.

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Statement of the case.

JAMES W. MORRISON v. DAVID C. CASEY.

DEEDS. *Description. False recital. County of location. Tax collector. Power.*

A deed to an eighty-acre tract of land, accurately described by governmental survey description, executed by the owner, will convey the whole tract, although it be recited in the conveyance to be situated in a designated county when only a part thereof is so situated; but a tax collector's deed under such circumstances does not convey lands without his county.

FROM the chancery court of Sharkey county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Casey, appellee, was complainant, and Morrison, appellant, was defendant in the court below. From a decree overruling a demurrer to complainant's bill defendant appealed to the supreme court.

The suit was to cancel certain deeds as clouds upon the title of complainant to seven acres of land in Sharkey county, being that part of an eighty-acre tract (the west half of the southeast quarter of sec. 8, Town. 12, Range 7 west) lying and being in Sharkey county. Indian Bayou, a stream, separates Sharkey from Issaquena county, and all of the eighty-acre tract, except the seven acres sued for, is situated in the last-named county. The complainant pleaded several different deeds and claimed under two sources of title, one originating in a tax collector's conveyance, made by the tax collector of Issaquena county, which purported to convey the entire eighty-acre tract, although seven acres thereof were not in his county. The complainant's bill, however, did not stand upon the tax collector's deed alone, but set up another source of title, one of the deeds in which, the one from the liquidating levee commissioners, falsely recited that the entire eighty acres were situated in Issaquena county.

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Brief for appellant.

Green & Green and *McLaurin & Clements*, for appellant.

This case comes here on an appeal from a decree overruling a demurrer to the bill. It was error not to sustain the demurrer because the bill does not deraign title as required by Code 1892, § 501. *Long* v. *Stanley*, 79 Miss., 298.

The court judicially knows that Sharkey county was formed in 1876. The deed from Gwin & Hemmingway, commissioners, to Memphis & Vicksburg R. R. Co., in 1881, purports to convey the west one-half and west one-half of east one-half sec. 8, town. 12, range 7 west, containing 475.66 acres. This on its face shows that all of the land called for by the description—viz.: 480 acres, was not intended to be included. Turning, then, to the deed and interpreting it by its four corners or calls, *Dunbar* v. *Aldrich*, 79 Miss., 698, we find that in describing this fractional part of the west one-half of east one-half it is expressly described as "the following lands situated in Issaquena county." Manifestly, under this conveyance the purchaser only took a fractional part of the quarter, and the part that he took was expressly limited to that part situated in Issaquena county.

There is no ambiguity on the face of the deed. It did not purport to convey that fractional part of the quarter lying in Sharkey county.

This court held in *Ladnier* v. *Ladnier*, 75 Miss., 781, that the subdivisions by the government into sections and townships was irrespective of county lines, and hence, that the description of land by section, township, and range, omitting the county, would be good, if there was no other section, township, or range that would fit the description. But that rule could not have operation here, because the description confines the land conveyed to land "situated in Issaquena county," and the quarter section lies partly in Issaquena county and partly in Sharkey county. It is manifest that the deed only intended to convey and to be paid for 475.66 acres in Issaquena county. It

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Brief for appellant.

affirmatively appears on the face of the deed that the purchase did not purport to include the whole of the acreage in the quarter section, but only such part as was in Issaquena county.

These levee commissioners were officers of court in making this conveyance, and the court in making the deed cannot be presumed to have intended to have conveyed more land, and in a different county from that expressly defined in the deed.

To do so would do violence to two express terms of the deed —viz.: the amount of land conveyed, and the specific location of the land in Issaquena county.

The rule of construction is, ordinarily, that the acreage would not control the calls of the deed by sectional subdivisions, but when to the acreage is added that the land is situated in a particular place, Issaquena county, then the sectional subdivision, must yield to the specific location of the land in the particular county. *Potts* v. *Canton Warehouse Co.*, 70 Miss., 462; 4 Am. & Eng. Enc. Law (2d ed.), 770; *Newman* v. *Foster*, 3 How., Miss., 383.

The principal objects in the minds of the parties was the general description of the county in which the land was located. *O'Herrin* v. *Brooks*, 67 Miss., 266.

The description of the land as situated in Issaquena county, of necessity, makes the official map of Issaquena county a part of the description, whether referred to or not, 1 Jones Real. Prop. & Convey., sec. 424, and this map conclusively shows that the land in controversy when the deed was made was not in Issaquena county.

The deed must be interpreted as to description by the state of facts existing at the time it was executed. *Dunklee* v. *Wilson, R. R.*, 24 N. H., 489, and the official map existing at the date of the deed. *Penry* v. *Richards*, 52 Cal., 672.

The location and identity of the land must be ascertained from a consideration of the whole description. *Herrick* v. *Hopkins*, 23 Me., 217; *Bell* v. *Woodward*, 46 N. H., 315.

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Brief for appellee.

The quantity controls where the other parts of the description are not sufficiently certain in defining the parcel or land intended to be conveyed, and where there is a clear intention expressed in the deed to convey a certain quantity only. 4 Am. & Eng. Enc. Law (2d ed.), 791.

Brown & Brown, for appellee.

The sale of the land in October, 1881, to the Memphis & Vicksburg Railroad Company was made under decree of the chancery court of Hinds county in the case of *Joshua Green et al.* v. *Gibbs & Hemmingway,* to enforce the lien in favor of holders of bonds of the old levee board and passed a good title. *Green* v. *Gibbs & Hemingway,* 54 Miss., 592.

Under the act of the legislature of March 14, 1884, the auditor was required to release all claim of the state to the lands. This release was executed in pursuance to the act on September 30, 1884. Laws 1884, pp. 182, 183.

The commissioner's deed of October 3, 1881, conveying west one-half of east one-half sec. 8, T. 12, R. 7 W. (which includes the strip in controversy) conveyed the whole of the legal subdivision described as well the part in Sharkey as that in Issaquena. *Hanna* v. *Renfro,* 32 Miss., 125.

The sale for taxes by the sheriff of Issaquena county in March, 1896, was utterly void as to the strip in Sharkey county for want of power in the sheriff to sell for taxes lands not in his county. The title to the part of sec. 8, T. 12, R. 7 W. east of the bayou, the line between Sharkey and Issaquena, remained in the Southern Land & Investment Company unaffected by the sale, and that title was purchased by complainant Casey.

The deed under which Morrison claims was made under Code 1892, § 2578. The state acquired no title to the tract in controversy by the sale had by the sheriff of Issaquena county, and could convey none. The bill shows a perfect title in complainant Casey, and utter want of title in the defendant Morrison.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

If complainant below had any title it came through the Southern Land & Investment Company, from which he purchased "to fortify," as he says in his bill. He fails in his effort to show title by adverse possession or from the Delta Trust Company, for it had none. The seven acres are in the west half of the southeast quarter, which did not belong to that company. The question is whether the deed of the levee commissioners conveyed the small fraction of seven acres, which was and is in Sharkey county, recited as in Issaquena county. If it did, it was by force of the maxim, *"Falsa demonstratio non nocet,"* but, if that is applied to their deed, does it also apply to that of the tax collector, under which Morrison claims? While the maxim is applicable to official conveyances to a certain extent, there is here a question of the power of the officer to sell. The tax collector was without power to sell land beyond the limits of his county. In the other case there was power to sell, and the mention of Issaquena county did not limit the operation of the deeds to land in that county, as would have been true had the description been "so much, or such part, etc., as is in Issaquena county." *Wilt* v. *Cutler,* 38 Mich., 189; *Beal* v. *Blair,* 33 Iowa, 318; *Ladnier* v. *Ladnier,* 75 Miss., 781, 23 South., 430.

Affirmed and remanded, with sixty days to answer from date of filing the mandate below.

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Statement of the case.

SAMUEL LEVY *v.* THOMAS J. ROSSEL ET AL.

1. CHANCERY. *Order appointing receiver. Construction. Exemption.*

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution.

2. SAME. *Contract devoting property to creditors. Exemption.*

A contract by mercantile partners, who are largely indebted, that their business shall be conducted by others, and that all money arising therefrom shall be applied *pro rata* to the debts of the partnership, with power in the succeeding managers to replenish the stock, but requiring that the proceeds of all sales shall be deposited in a bank and paid out ratably to the creditors, will preclude the partners from claiming an exemption in the property covered by the contract.

FROM the chancery court of Harrison county.

HON. STONE DEVOURS, Chancellor.

Rossel and others, appellees, were complainants, and Levy, appellant, and others, were defendants in the court below. For the report of a motion in the case see *Levy* v. *Rossel, ante,* 68.

In May, 1900, appellant, Levy, and one Antoine Belande entered into an agreement to carry on a dram shop in Biloxi. By the terms of their agreement, Levy was to furnish all the money, and to sustain all losses and receive all net profits. Belande was to manage the business and receive $50 per month and 2 per centum of the gross receipts, and not to share in the profits or losses of the business. The business was conducted under the firm name of Levy & Belande. The business was thus conducted until December, 1901, when Levy became insolvent, and the partners disagreed as to the management, and the business was largely in debt. They reached an agreement, which was reduced to writing, by which the business was to be turned over to Kennedy and Glennan, as managers, with full

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Brief for appellant.

power and authority to conduct the business, and to pay out the money arising therefrom to the payment of the debts of Levy & Belande, share and share alike. These managers were empowered to replenish the stock from time to time, and were to deposit the net proceeds of the business in a bank of Biloxi, to be paid out ratably to the creditors of Levy & Belande. Kennedy and Glennan conducted the business until the license expired, and deposited the money (twelve or fifteen hundred dollars) in a bank, but failed to pay it out to the creditors of Levy & Belande; and Glennan assumed exclusive control, and was paying this money out to some of the individual creditors of Levy. In the meantime Levy had filed a voluntary petition in bankruptcy and had received his discharge, and had listed this money as part of his individual assets, and attempted to get it into the hands of the trustee in bankruptcy. Appellees, creditors of Levy & Belande, then filed the bill in this case in the chancery court, and asked that a receiver be appointed to take charge of the property to be administered in the chancery court. All the defendants entered their appearance, and consented to the appointment of a receiver, except Levy, who answered the bill. He averred in his bill that he was the head of a family, a citizen of the state, a householder having a family residing in the city of Biloxi, and entitled under the concluding clause of § 1971, Code 1892, to $250 exemption. The chancellor appointed a receiver, and from the order Levy appealed to the supreme court.

Harper & Harper, for appellant.

The evidence shows clearly that Levy is entitled to claim exemptions as the head of the family. The courts of Mississippi and the federal courts are liberal in their interpretation of exemption laws in favor of the debtor, they hold that any interest in the personal property, whether fee simple, life estate, or mere possessory title or right of possession, is sufficient to en-

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Brief for appellant.

title the debtor to his exemptions. They go so far as to allow the owner to convey his property in fraud of his creditors and then claim his exemptions in the property when the deed is set aside by the creditors.

Brandenburg on Bankruptcy says, on page 81: "Where a conveyance, fraudulent as to creditors, is set aside by a bankrupt court at the instance of the assignee the parties are restored to the state they occupied prior to such conveyance, and a bankrupt is entitled to his exemptions and is not estopped by said fraudulent conveyance."

In the case of *Steen* v. *Hamblet,* 66 Miss., 112, Justice Campbell delivering the opinion says that a possessory claim is sufficient to entitle the debtor to the exemptions simply because the legislature says that he shall have such exemptions. In the case of *Dulion* v. *Harkness,* 80 Miss., 8, Justice Terral, delivering the opinion, sustains the doctrine laid down by the numerous authorities cited by Brandenburg on Bankruptcy.

In cases of partnership as in cases of tenants in common the exemption does not exist unless of course their interest is ascertained or severed, and then in either case the exemption is allowed. "Where there is no fraudulent intention partners may dissolve the partnership or sever their interest in the property, or one partner sell his interest to the other, and the continuing partner may have his exemptions the same as if no partnership had existed. *In re Bjornstad,* 18 N. B. R., 282.

Property exempt by the laws of the state does not pass to the trustee in bankruptcy at all; he acquires no title to it and the title of the owner is not impaired by the proceedings in bankruptcy. *In re Hunt,* 5 N. B. R., 493, Federal cases 6, 883; *In re Hester,* 5 N. B. R., 285, Federal cases, 6437; *Bush* v. *Lester,* 15 N. B. R., 36; *Wilkinson* v. *Wait,* 44 Vt. 508; *Felker* v. *Crane,* 70 Ga., 484.

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Brief for appellee.

Dodds & Griffith and *Ford & White,* for appellee.

Levy claims exemption out of property he had eight months before turned over absolutely to Glennan and Kennedy as trustees for the creditors of the firm of Levy & Bellande.

The assignment to Glennan and Kennedy, and the complete delivery of possession under it constituted an informal assignment; it is a transfer of the property to trustees for the application thereof to the payment of the debts of Levy & Bellande. Burrill on Assignments, 3. The creditors accepted the arrangement and Glennan and Kennedy took full possession and absolutely of all the property, and all parties went ahead and acted on such assignment for eight or nine months, or until the trustees disagreed and began to misapply and waste the property. Appellant Levy is now inclined to say that this cannot be considered an assignment because as such it would provide a scheme for the violation of the law, and would thus be void totally.

Levy cannot be permitted to take advantage of his own wrong and, having authorized the scheme of assignment, turned over all his property, and the trustees long in possession, with the creditors afterwards accepting the arrangement, he, Levy, cannot now be heard to say the assignment is invalid. It is valid as to him. And being such assignment, if he desired his exemptions he should have reserved them. *Burrill on Assignments,* 98, 28 Conn., 47, 17 Mich., 38.

High on Receivers, p. 459, says: "And the rule holds good even though the order of appointment is in general terms without excepting exempt property, since such order, however broad in its language, must be understood as limited in its operation by the statute exempting the property from execution, and the law attaches to the order and becomes a part of it." So the general order would be no cause for reversal, as the exemption can be allowed under the order, especially as in the present case where no property was taken out of the hands of appellant by the appointment, and had appellant prosecuted his claim in

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Opinion of the court.

the lower court directly for his exemptions, if entitled to it, he could have got it as soon or sooner than by appealing.

Argued orally by *W. R. Harper,* for appellant, and by *Virgil A. Griffith,* for appellee.

CALHOON, J., delivered the opinion of the court.

The appointment of the receiver was entirely proper, upon the facts of this case. Whether Levy was entitled to set up the exemption claim on the ground that he and Belande were not partners, and that all the money, proceeds of the sale of liquor, etc., belonged to him or not, it is clear that by agreement between him and Belande, on one part, and Kennedy and Glennan on the other, Levy expressly agreed, as did Belande, "that all money arising from the proceeds and management shall be scrupulously devoted to the payment of our just debts, share and share alike, the list of which debts is hereunto attached and made a part of this exhibit." The agreement referred to contains this further clause: "It is further required by the said Levy and Belande, and it is agreed by the said Glennan and Kennedy, that, at the end of every 60 days after they take charge of said business, they will pay to one of the banks of said city, to be selected by themselves, all of the net profits arising from said business, to be paid out by the said bank ratably to the persons named in the list of creditors hereto attached." Here is an express agreement on the part of Levy that all the money realized from the sales by Glennan and Kennedy should be paid, one-half on his debts and one-half on Belande's debts. In other words, here is a devotion of all the proceeds of these sales to the debts of Levy & Belande, share and share alike. It cannot be held, in the face of this agreement, that Levy has not precluded himself from claiming any of the property as exempt, since by the contract the property was devoted to creditors. The action of the learned chancellor was, on this ground,

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Opinion of the court.

correct. So far as the order appointing the receiver was concerned the law relating to exemptions became a part of that order, just as if written in it, and hence the order should be read as not directing the receiver to take charge of anything which was properly exempt. *Finnin* v. *Malloy,* 33 N. Y. Super. Ct., 382.

But we understand the scope of the agreement mentioned to be that all the money realized from the sale of wines, liquors, etc., should be applied as stated, and that the only purpose for keeping wines, liquors, etc., on hand, by replenishing, was to devote their profits, when sold, to the payment of the debts of Levy & Belande. It seems to us that the purpose of the agreement on the part of both Levy and Belande was that the entire stock of liquor, etc., should be converted into money, and that that money should be applied as stated. It is clear from the record that all the fixtures in the dramshop were covered by a mortgage, and that even the cash register was subject to a lien for the purchase money. No exemption could be claimed in them.

Under this state of case we think the contract devoted the property to creditors and precludes Levy from claiming an exemption therein; and for this reason the decree appealed from is affirmed.

Affirmed.

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Statement of the case.

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EDWARD S. BUTTS v. FRANCES J. RICKS.

1. TAXATION. *Assessment. Unconstitutional act of legislature. Abandonment.*

An existing valid assessment of land is not affected by the passage of an unconstitutional and void act of the legislature purporting to provide for a new assessment, and cannot be said to have been abandoned.

2. TAX TITLE. *Statute of limitations. Code* 1892, §2635.

Where the purchaser of land at a tax sale went into the actual possession of the land after the expiration of the time allowed for redemption, and remained in such possession for three years, claiming under his tax deed, a suit to recover the land because of defects in the tax sale or any step leading to the sale is barred, under Code 1892, § 2735, so providing.

3. SAME. *Possession of part extended to whole tract. Navigable stream.*

The fact that a body of land is divided by a navigable stream and the part actually occupied lies entirely on one side of the same will not of itself prevent the application of the doctrine that the actual occupation of a part of a tract by one, claiming under a deed, will be referred to all the lands conveyed by the deed.

FROM the chancery court of Yazoo county.

HON. HENRY C. CONN, Chancellor.

Butts, appellant, was complainant, and Mrs. Ricks, appellee, was defendant, in the court below.

Complainant, by his bill of complaint, alleged that he was owner of certain lands described in the bill, but that defendant was in possession thereof, and had been for over three years, claiming under a tax deed dated March 2, 1891; that said tax deed had been executed by the tax collector in pursuance of an attempted sale of the land for taxes alleged to be due thereon for the year 1890; but that said sale was void because there was no assessment for 1890, but the tax collector in making the sale

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Brief for appellant.

acted under the assessment of 1889, which was made as directed by the act of 1888, Laws 1888, pp. 24-27, which was unconstitutional, and had been so adjudged by the supreme court. See *Hawkins* v. *Mangum*, 78 Miss., 97. Appellant filed with his bill an abstract of title, which showed that he was the owner of the lands, unless appellee had acquired title by her tax deed and occupancy. Complainant prayed for the cancellation of the tax deed. Defendant relied on the following defenses: That the sale of March, 1891, under which she claims, was not made under the assessment of 1889, but the assessment of 1888, as provided by a local act of the legislature entitled "An act to authorize the assessment of land in Yazoo county for the year 1888" (Laws 1888, p. 463, c. 378); that she had actually occupied the land for three years since the expiration of the period of redemption; and that the three-years statute of limitations (section 2735, Code 1892) was a bar to the suit. To the first of these defenses complainant insisted that the board of supervisors and the tax collector had abandoned the assessment of 1888, and that the sale was actually made under the assessment of 1889. The Yazoo river runs through this tract of land, and only a small portion of it is on one side of the river, the remaining portion being on the opposite side of the stream, the same being a navigable stream lying wholly in this state. Defendant was in actual possession of the smaller portion. It was contended by complainant that the two parts of the land were not contiguous, even if section 2735, Code 1892, did apply. The court below decreed in favor of defendant, and complainant appealed to the supreme court.

Edwin R. Holmes, for appellant.

In regard to the argument that there had been no abandonment of the assessment of 1888 by the board of supervisors or the tax collector because of the act (Laws 1888, p, 24), commonly called the Madison act, was unconstitutional and void,

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and that therefore all the acts of the board and the tax collector under the assessment of 1889 were insufficient to work an abandonment of the 1888 assessment, and that the 1888 assessment was still in force in 1890, it may be confidently affirmed that there was a *de facto* abandonment. Both the board and the tax collector acted in good faith under the Madison act, and that act, although unconstitutional, was sufficient authority to them to abandon the 1888 assessment, since it had not then been pronounced unconstitutional by the courts. In other words, since the tax collector was a mere ministerial officer, it was his duty to act under the assessment of 1889, made under the Madison act, and to abandon the assessment of 1888, since the Madison act was valid on its face and had never been judicially declared unconstitutional. In the case of *Railroad* v. *West,* 78 Miss., 789, 811, this court said: "Besides, the sheriff is a mere ministerial officer, both as sheriff and as tax collector. It could not be expected of him to construe a statute expressly granting an exemption and determining judicially, as the court would, whether an exemption was constitutional or not, it never having been contemplated that a mere ministerial tax collector should undertake the tremendous responsibility involved in such exercise of judicial functions. He might well plead, as a good and sufficient excuse for not selling the property of this railroad, that he found an express statute granting an exemption upon conditions, which conditions had been complied with by making the required affidavits. *Whether the express statute violated the supreme law of the land—the state constitution—conformity to which is essential to the validity of every legislative act, was a solemn judicial question for the courts to determine in a suit* which he could not, and which the revenue agent could, institute for that purpose." Citing Cooley on Tax (2d ed.), 710; *Wiley* v. *Sinkley,* 179 U. S., 66; *Mayson* v. *Mo.,* 179 U. S., 333; *Mechem on Public Officers,* sec. 523. Also in *Revenue Agent* v. *Stonewall Mills,* 80 Miss., on page

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Brief for appellee.

113, this court said: "As held in *Railroad Co.* v. *West, supra,* it was not the duty of the tax collector, acting in a mere ministerial capacity, to pass upon the validity of the exemption claimed, either under the statute or the *constitution.* This is a judicial question."

The Madison act, valid on its face, was sufficient to authorize the tax collector to abandon the assessment of 1888, and whether authorized or not both the tax collector and the board of supervisors actually did abandon the 1888 assessment and approved and adopted the assessment made under the Madison act, but even if the assessment of 1888 was still in force, this sale did not take place under it.

As to the three-years statute of limitations, the learned chancellor below held it applicable to this sale, which he held at the same time to have taken place under the assessment of 1889, and void. His idea was that no assessment was necessary to constitute the tax payer debtor to the state, that an assessment was a mere adjudication of the *amount due,* and that there was an unliquidated sum due without any assessment at all, and that wherever taxes were due, the three-years statute applies. In this he was in error. "The essential things which create authority in the tax collector to collect the taxes by sale are: a legal assessment (that constitutes the owner of the property debtor to the state); and, second, etc." *Virden* v. *Bowers,* 55 Miss., 1; *Wolfe* v. *Murphy,* 60 Miss., 1. Now it is true, as held in *Waterworks Co.* v. *Supply Co.,* 80 Miss., 68, that taxes operate as lien upon property before the *levy* is made, the levy merely fixing the amount due, but not so as to an assessment. The land is not bound for the taxes until there is an assessment, and a constitutional assessment. Code 1892, § 3746. Even a tender is unnecessary if there has been no valid assessment. *David* v. *Vanarsdale,* 59 Miss., 367.

Barnett & Perrin, for appellee.

The law of 1888, commonly called "the Madison Act," being

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Opinion of the court.

unconstitutional because land could not be assessed as therein provided, the entire act and all of its provisions became void. A law can, in a proper case, be held valid in part and invalid in other respects, but the court can never separate the good from the bad where the purpose of the legislature should thereby be defeated; where one provision is dependent upon another. *Gibbs* v. *Fant,* 54 Miss., 396; *Black on Int. of Laws,* 96.

The act cannot be rejected to defeat appellees' title and upheld to work a legislative abandonment of the assessment of 1888. It is certain that the assessment of 1888 would not have been interferred with by the legislature unless that body had believed the Madison act was constitutional in all other respects. It was not the purpose of the legislature to abandon all assessments and leave the state with none. If, then, the assessment of 1888 was not abandoned by the legislature in its enactment of the Madison act, it vitally remained unimpaired. Neither the boards of supervisors nor the tax collectors can abondon an assessment without legislative authority.

If, however, the court should be of the opinion that the tax sale was not made under the assessment of 1888, appellee's title under the tax sale was perfected by the three years' possession. There was a valid assessment of the land, it was subject to assessment, it was subject to sale, there was a valid levy; taxes were due thereon and no payment or tender was made, and it was sold by the proper officer. *Brougher* v. *Stone,* 72 Miss., 647; *McLemore* v. *Scales,* 68 Miss., 47; *Hoskins* v. *Railroad,* 78 Miss., 768.

The last case cited overrules *Patterson* v. *Durfey,* 68 Miss., 779, and *Carlisle* v. *Yoder,* 69 Miss., 384, only in so far as those cases held that title to lands not assessable could be acquired by tax sale.

PRICE, J., delivered the opinion of the court.

There was a valid existing assessment on the land under the

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Statement of the case.

act of 1888 (Laws 1888, p. 463, c. 378), and an unconstitutional and void act of the legislature could not work a legislative abandonment. The land was owned by private individuals, and subject to taxation. The taxes were not paid on the land, and in 1900 the tax collector advertised and sold the land for unpaid taxes of 1899, and executed to the purchaser a conveyance in pursuance of such sale for taxes. The purchaser at the tax sale after two years—the time allowed for redemption—went into actual possession of the land, and he, or those holding under him, have since occupied it. Under section 2735, Code 1892, such a title, with such holding, stands as a bar to appellant's right of recovery. Actual possession of a portion of the land under the facts and the calls of the deed was possession of the whole tract.

Affirmed.

JAMES NORFLEET v. JABIN E. BEALL.

DEED. *Undue influence. Confidential friend. Invalid grantor. Family physician.*

A deed from an invalid, credulous and weak-minded old woman, prepared by the attorney of the grantee, purporting to convey her entire estate, a parcel of land, with the reservation of a life estate in the grantor, to her family physician and confidential friend, in consideration of care and medical attention and fifty dollars, is void, in the absence of evidence showing that the transaction was free from fraud and undue influence.

FROM the chancery court of, first district, Hinds county.

HON. HENRY C. CONN, Chancellor.

Norfleet, appellant, was complainant, and Beall, appellee, a colored physician, was defendant in the court below. From

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Brief for appellant.

a decree dismissing the bill the complainant appealed to the supreme court. The facts are stated in the opinion of the court. It may be added, however, that the land was shown to have been worth one thousand dollars.

Harper & Potter, for appellant.

The evidence as to the value of the property in question varies from $700 to $1,400. It is undenied that Elizabeth was never allowed to consult her friends, white or black, and had no advice, legal or otherwise, and she seems to have been guarded until the affair had been hurriedly concluded.

There is no proof that she understood, or was capable of understanding, the complicated conveyance, or that it would cut her son out, or that the doctor's bill for William was not a debt that she was bound to secure or pay.

The impropriety of the transaction before the court is so gross as to shock a person of decent sensibilities.

That a family physician holding, as it were, the life of his patient in his hands, should so situate himself as to become interested in her death, when his stimulus and reward should be in her continued good health and long life, is monstrous.

The record shows that Dr. Beall was the trusted friend and family physician of Elizabeth Robinson, an illiterate negro, seventy-five years of age. This much is undisputed, and it is a fact known to all men that untrained minds are weak at that stage, and it is only by hard training and use that the mind remains intact after three score years and ten. But this is not all. We think that the court must be satisfied, from the great preponderance of the evidence in the case, that this old woman was a person of weak mind and of great credulity.

The inequality of the situation is appalling. A poor, old negro woman, past her allotted days, pressed by her son's infirmity and weakness and suffering, set upon by and trafficking with men of cunning, seeking to promote their own interest,

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without aid or counsel of friends, she was, and was of necessity bound to come to the terms proposed by her physician and pretended friend. She was made to feel that her son's life hung in the balance. *Allore* v. *Jewell,* 94 U. S., 506; 2 Pomroy's Equity Jurisprudence, 963; *Clark* v. *Lopez,* 75 Miss., 932.

Stirling & Harris, for appellee.

A person of weak mind has as much right to convey property as one of great mental capacity, if no undue influence is exerted, and the evidence of Beall, and every one of the witnesses who were present at the execution of the deed, show that there was no pressure or influence used at the time by Beall to induce its execution.

The evidence absolutely fails to sustain the contention of the bill that there was failure or inadequate attention rendered by Dr. Beall, even the witnesses for appellant in some instances testifying that he went to see William Henry as often as twice a day, and Jones, witness for appellant, testified that Dr. Beall treated William Henry for several years. *Bunch* v. *Shannon,* 46 Miss., 525; *Simonton* v. *Bacon,* 49 Miss., 582; *Plant* v. *Plant,* 76 Miss., 560; *Ala. etc. R. Co.* v. *Turnbull,* 71 Miss., 1029; *Watson* v. *Mahon,* 20 Ind., 236; *Crispell* v. *Duboys,* 4 Bar. 393.

Argued orally by *Wiley H. Potter,* for appellant, and by *J. B. Stirling* and *Girard Harris,* for appellee.

PRICE, J., delivered the opinion of the court.

James Norfleet filed a bill in the chancery court of Hinds county, as the brother and only heir at law of Elizabeth Robinson, deceased, against Dr. J. E. Beall, to cancel as fraudulent and void a deed of conveyance made by Elizabeth Robinson to a certain lot of land in the city of Jackson, for a recited consideration of care and medical attention for herself and only son

Digitized by Google

Opinion of the court.

and $50 cash. Dr. Beall took a deed to the land, with a life estate reserved to his patient, Elizabeth Robinson.

The conveyance is assailed on the grounds that she was overreached, and the deed procured by fraud and an inadequate consideration. There was a decree for the defendant in the court below, and the case comes here on appeal by the heir of Elizabeth Robinson. She was an ignorant, credulous, weak-minded negro woman, seventy-four years of age, the only support of an invalid son, whose drunken life for many years had made him a heavy charge upon her pecuniary means of support. When the deed was made he was within a few months of the grave, in fact within eight months both mother and son were dead, and the life estate gone out, and the doctor in full possession of his reward.

The old, feeble negro woman, with physical and mental powers weakened by sickness, suffering, and age, pressed by the infirmity and great suffering of her only boy, stood on no terms of equalty with her confidential friend and family physician and his attorney. She was no match for the astute physician and his attorney, who drove out to her home with deed prepared for no other purpose but to see the novelty of an old colored woman disinherit her only son and convey to her family physician, confidential friend, and adviser all the property she possessed on this earth except the life estate in her home. Such a transaction between parties sustaining such relations cannot be sustained in a court of equity, unless the proof leaves the transaction free from fraud and undue influence. The fraud in this whole transaction is so perfectly manifest to this court that the deed cannot stand the required test, and it is therefore cancelled as fraudulent in its procurement, and the case is reversed and remanded to be proceeded with according to law.

Reversed and remanded.

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Statement of the case.

WILLIAM T. ANDERSON ET AL v. ALBERT T. MCNEAL ET AL.

1. STATUTE OF LIMITATIONS. *Must be pleaded. Debtor.*

Unless the statute of limitations be pleaded by the debtor it is unavailing as a defense.

2. SAME. *Other creditors.*

The unsecured creditors of a debtor cannot compel him to plead the statute of limitations as a defense to his secured debt.

3. SAME. *Mortgage to secure barred debts.*

A *bona fide* conveyance by a debtor to secure some of his creditors cannot be avoided by his other creditors without offering to pay the secured debts.

FROM the chancery court of Tunica county.

HON. A. MCC. KIMBROUGH, Chancellor.

Anderson and others, appellants, were complainants in the court below; McNeal and others, appellees, were defendants there. The suit was an attachment in chancery by complainant Anderson and others, against McNeal, a nonresident of this state and others, all the defendants being residents of Tennessee. The writ was levied upon lands. The bill averred that certain conveyances made by McNeal to his codefendants were fraudulent and void because they were voluntary and were executed with the intent to defraud complainants in the collection of their debts, and it prayed that these conveyances should be vacated and annulled and the lands subjected to the payment of the debts due complainants. The answer of the defendants denied the fraud, charged that the conveyances were made by McNeal to secure certain debts due by him to his codefendants, and were in fact mortgages for that purpose. These debts were pleaded and the date of the maturity of each was shown to have been more than six years before

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Brief for appellants.

the beginning of the suit. This answer was made a crossbill against complainants, and it prayed for the sale of the lands as upon a foreclosure of the mortgages, the proceeds to be applied first to the satisfaction of the debts propounded in the crossbill, and the balance, if any, to be applied to complainants' debts. The complainants demurred to the crossbill on the ground that the claims propounded by it against McNeal were barred by the statute of limitations. The court below overruled the demurrer and the complainants appealed to the supreme court.

St. John Waddell, for appellants.

Section 2737, Code 1892, prohibits all actions on notes unless brought within six years after the cause of action accrues. Section 2733 of said code prohibits a suit in equity for the foreclosure of a mortgage or deed of trust unless brought within the time in which suit at law on the debt secured might have been brought at law, and provides that when the remedy at law to recover the secured debt is barred the remedy in equity on the mortgage shall also be barred.

The case of *Wright* v. *Mordaunt,* 77 Miss., 537, opinion delivered by Judge Calhoon, will be found to be a case almost on all fours as to facts with the case at bar except it was a suit at law on a note, whereas the present action is a suit in equity with the additional relief asked of foreclosing a mortgage on Mississippi land. That was a case where the note sued on was executed in the state of Illinois and made payable in the state of Illinois, and both parties to the note resided in that state at the time of its execution and maturity, and under the laws of the state of Illinois the note was not barred by the statute of limitations of Illinois. The maker of the note came to Mississippi and was sued here by the payee and he plead the statute of limitations of six years under sec. 2737, Code of 1892, and the court held that said statute governed, and in cases like that one there were no exceptions to deprive a defendant of the right

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Brief for appellants.

to invoke the bar thereunder and that sec. 2748, of the Code of 1892 did not apply.

Not only does sec. 2737 apply in the case at bar, but sec. 2755, of the Code of 1892, further declares that, when the period of limitation prescribed has been completed, that not only the remedy for the collection of the debt is barred, but the right itself is gone.

To state appellant's contention more clearly, it is as follows: The debt in question is a Tennessee debt, made in Tennessee and payable in Tennessee, and both the maker and payee have never resided in Mississippi and have always been and are now nonresidents of that state, and more than six years has elapsed since the debt became due, and appellant attached the land for the payment of a debt which was owing them by the debtor at the time he created the debt in controversy, and at the time he executed the mortgage securing that debt, and the debtor and the beneficiaries in the mortgage now come forward and ask that the mortgage be foreclosed and the secured debt paid, and appellant replies by the bar of section 2737 of the Code of 1892.

Appellant does not plead the statute of limitations of Tennessee, because that statute only affects the remedy for the collection of the debt and not the right to collect, and it is conceded that where the statute only affects the remedy and not the right, then the pleading of the bar is a personal privilege of the debtor and cannot be availed of by third parties.

Therefore appellants rely exclusively on the statute of Mississippi, the law of the forum, to-wit: The limitations of six years prescribed by sec. 2737, of the Code of 1892, and sec. 2755, of said code, which provides expressly that when the period of limitation has expired it not only extinguishes the remedy but defeats and extinguishes the right also. In other words, when six years had passed after the maturity of the

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Brief for appellees.

debt, not only is the right to collect the debt gone, but the debt itself is extinguished.

This statute operates on the debt itself and abrogates it by the limitation of time without suit, and makes the bar of the statute of limitations in Mississippi of the same force and effect as if the debt had been paid, and a fact which can be set up and relied on by any interested third party.

Patterson, Neely & Henderson and *Gilmer P. Smith*, for appellees.

No one but McNeal could set up the statute of limitations, and as McNeal does not plead the statute there is nothing to prevent the enforcement of the debts and the beneficiaries in this state. This has been expressly decided by this court in the case of *Perkins v. Guy*, 55 Miss., 177.

McNeal not only does not plead the statute, but he actually joins in the cross bill praying the court to execute the trust, and to pay these debts out of the lands which he originally conveyed to Bills for their security.

We confidently submit that the notes are not barred by sec. 2737, of the annotated code, and that the statute of limitations of Mississippi has no application in this case because no one of the parties, appellants or appellees, ever at any time resided in Mississippi. We insist that section 2748, of the Annotated Code, when construed in connection with section 2744, governs this case.

If the land had not been situated in Mississippi, the Tennessee statute, of course, only would apply. In other words, if a citizen of Tennessee should sue another citizen of Tennessee in the court of Mississippi on a Tennessee debt, the court would, in respect of the statute of limitations, simply enforce the law of Tennessee under sec. 2754; but in this case it may be conceded that the land is situated in Mississippi, and as the conveyance to Bills was, in point of fact, according to the

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Opinion of the court.

theory of the cross complainants, a mortgage and not an absolute deed, it follows that a cause of action accrued in this state to foreclose the mortgage. At the maturity of the notes, the holders could have filed a bill in the chancery court of Tunica county setting up the facts averred in the cross bill and secured a foreclosure of the mortgage and a sale of the lands for the payment of their respective debts. This being so, did the statute of limitation of Mississippi run as against nonresidents residing in Tennessee in favor of nonresident creditors residing in Tennessee, or was it suspended under sec. 2748?

To state the proposition in another form. For the reason that the holders of the notes did not come into Mississippi after the maturity of their respective notes and file a bill to foreclose the mortgage, can other creditors residing in Tennessee come into Mississippi and attach the land held by John H. Bills for security, and rightfully claim that the debts of the beneficiaries are not only barred, but extinguished, and therefore the court will apply the lands to the payment of the debts of the attaching creditors? Or put the case in another form. Could McNeal, a debtor, who never resided in Mississippi, come into the state and file his bill to divest the legal title out of John H. Bills, on the ground that the statute of limitations of Mississippi had extinguished the debts of the ladies from whom he had borrowed money?

We have only to say that these attaching creditors stand in no better or other position than McNeal, their debtor, and the case of *Nolan* v. *Snodgrass* (70 Miss., 794), is directly in point, as McNeal could not invoke the statute without the payment of the debts, neither could the attaching creditors, through him, through his title, and in his name accomplish the same result.

Argued orally by *St. John Waddell,* for appellants, and *Josiah Patterson,* for appellees.

CALHOON, J., delivered the opinion of the court.

The fundamental mistake of appellants is the idea that un-

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der our statute the mere lapse of the time required to bar the remedy bars it, and extinguishes the right, whether the debtor chooses to plead it or not. This is an erroneous view. The statute never operates to extinguish the right unless it is pleaded. But McNeal has not pleaded it. In fact, he refuses to plead it, and none can compel him to do so, and, as a consequence, the remedy is not barred, and the right is not extinguished. The debts being in full force, McNeal alone can plead the bar. His creditors cannot make him plead it, as it is his personal privilege to do so or not, as he pleases; and appellants' rights cannot rise higher than those of the secured creditors where he refuses to plead the bar. On the subject of the statute of limitations, applicable here, we simply refer to *Bower* v. *Henshaw,* 56 Miss., 619; *Robinson* v. *Moore,* 76 Miss., 89, 23 South., 631; *Kennard* v. *Alston,* 62 Miss., 763; *Hunt* v. *Belknap,* 78 Miss., 76, 28 South., 751.

By the deed of March 27, 1900, duly recorded, Bills held the legal title to the lands which were attached in 1902. He says he holds it in trust for the security of appellees, creditors of McNeal. The attaching creditors are in the shoes of McNeal, and can have no higher rights than he, and equity would not listen to a prayer by him to annul Bills' title without offering to pay the secured creditors.

Appellants and appellees are all creditors of McNeal, and their claims and rights must not be confused with claims and rights which might be well asserted by creditors of Bills against his concealed beneficiaries. The distinction is obvious, and with it in mind the solution of the question in this record is easy. A sale by Bills to a purchaser without notice would, of course, carry the title, and so an attachment by a creditor of Bills would outrank all these Tennessee people. But the controversy between themselves presents a very different case, all being genuine creditors of McNeal. Code 1892, § 4230, has no

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Statement of the case.

pertinency to this contest in the category of the parties in this case.

Affirmed and remanded, with sixty days to appellants to answer the crossbill after mandate filed below.

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AUSTIN PULPUS v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Homicide. Evidence.*

In the absence of evidence of a conspiracy, the statement of a third party, not made in the presence of the accused, to the effect that "they" were not going to prosecute the deceased for assaulting the defendant, but "were going to get him," is not admissible on the trial of the defendant for afterwards killing deceased.

2. SAME. *Co-defendant's escape.*

On the trial of a defendant for homicide it is error to permit the state to prove that a co-defendant, not on trial, had left the state and forfeited his bail bond.

3. SAME. *Self-defense. Surrender of right.*

The right of self-defense is not surrendered, although defendant armed himself with a deadly weapon and sought his adversary with intent to kill him and was the aggressor in the altercation in which he killed him, if after the beginning of the altercation defendant abandoned the intent and the killing was not in pursuance of it.

FROM the circuit court of, first district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Pulpus, appellant, was indicted, tried and convicted of murder, and appealed to the supreme court. The opinion of the court states the facts of the case.

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Brief for appellant.

T. J. Buchanan, for appellant.

This case was the killing of a human being by another unaided or abetted by any one, but the state attempted to prove a conspiracy on the part of all the defendants and others to kill and murder the deceased. The evidence completely fails in this; there was not a word or act of the defendant that was not satisfactorily explained and shown to be inconsistent with the theory of the state.

While there has been some difficulty among the different authors and text writers on criminal law as to a definition of conspiracy broad enough to cover all cases, still, where the object is criminal, there is no conflict whatever.

It is manifest that the court erred in admitting the statement of Isaiah Gillespie in the case against the defendant; there having been no foundation laid by proof establishing or tending to establish the existence of a conspiracy or combination by him and the party on trial to commit the offense charged. Greenleaf lays it down, in terms, that the acts and declarations of conspirators and accomplices to be admissible in evidence must be confined to acts and declarations made or done "during the pendency of the criminal enterprise, and in furtherance of its object." 1 Greenl. on Ev., sec. 127; 3 *Ib.,* 280, 233; *Browning* v. *State,* 30 Miss., 656; *Ganad* v. *State,* 50 Miss., 147. The court erred in admitting Wiley Gladney to testify to what Theo Wilson said the day before the killing, to the effect that he, Wilson, called him aside and asked him if defendant was not going to report the deceased for splitting his head open with the spade, when Wilson replied that "they would get him." This statement was made in the absence of defendant, and there was no evidence attempting to connect Wilson with the killing and no attempt to connect him with any conspiracy to kill the deceased.

Gilleylen & Leftwich, on same side.

Declarations of one of the conspirators are never admissible

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Brief for appellant.

against the others unless the conspiracy has been established by other evidence. *Spies* v. *People,* 3 Am. St. Rep., 689; *Wiggins* v. *Leonard,* 9 Iowa, 194; *Ford* v. *State,* 112 Ind., 373; *State* v. *Weaver,* 57 Iowa, 730.

Declarations made by one before the conspiracy begins are no more admissible than those made after it is passed. Mere historical statements of one are not admissible against others of the conspirators. *Cox* v. *State,* 8 Tex. App., 254; *Everage* v. *State,* 21 So. Rep., 404, 113 Ala., 102; *Brunson* v. *State,* 27 So. Rep., 410, 124 Ala., 87; *Cryer* v. *State,* 71 Miss., 467.

One person cannot be connected with a conspiracy by the declaration alone of a third person. *Ford* v. *State,* 112 Ind., 373, 383.

The admission of Wilson's declaration, if he were on trial, would be another question. But such evidence is confusing to the jury and damaging to the defendant. There is no evidence at all as to whom Wilson had in mind when he said "they were going to get him." Anderson was being talked about, which might identify "him," but who "they" were who were going to get "him" is nowhere disclosed. The statement is entirely too indefinite to bind defendant. *Res inter alios acta alteri non debet.*

To show a conspiracy there must be proof that more than one person is guilty of complicity in the killing. Mere presence is not enough. *Hairston* v. *State,* 54 Miss., 689; *Spies* v. *People,* 3 Am. St. Rep., 689.

This declaration of Wilson was admissible, if at all, owing to its indefiniteness against him only. *Brunson* v. *State,* 27 So. Rep., 410; *McAlpin* v. *State,* 23 So. Rep., 130.

The giving of charge No. 2 is manifestly error. This charge is condemned three times in one volume of reports of this court. *Smith* v. *State,* 75 Miss., 542; *Patterson* v. *State,* 75 Miss., 670; *Fore* v. *State,* 75 Miss., 727.

It is again condemned in *Lofton* v. *State,* 79 Miss., 734. It

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Brief for appellant.

is rightfully in disrepute. It outlaws a defendant charged with crime in the courts of his country. It estops him from setting up the constitutional right of self-defense. It betrays a manifest effort of district attorneys overzealous to charge defendants into the penitentiary and onto the gallows. There may be cases in which this charge is proper, but they are exceedingly rare, and so delicate are the rights invaded by it that it must be exact in the statement of facts and to stand the evidence must support every word of it. Specifically this charge in this case is open to several fatal objections.

First. There is no evidence in the record that Austin Pulpus was hunting George Anderson to kill him.

Second. This charge, by the language, "armed with deadly weapon provided for the purpose," assumes as proven and as a fact what is not proven at all, we say, certainly it is a fact hotly controverted in the evidence.

This was error. *Myrick* v. *Wells,* 52 Miss., 149; *Hogan* v. *State,* 46 Miss., 274; *Ledbetter* v. *State,* 61 Miss., 22; *Brown* v. *State,* 72 Miss., 997; *Smith* v. *State,* 75 Miss., 542; *Coleman* v. *Adair,* 75 Miss., 660; *Fore* v. *State,* 75 Miss., 727.

Third. The charge assumes it to be proven that "when he (Pulpus) found Anderson he provoked a difficulty with Anderson, or was the aggressor in a difficulty in which he killed Anderson." This is also a groundless assumption.

Fourth. The charge is fatally erroneous in assuming that the killing under the facts stated would have been murder in any event. Such is not the case. The purpose to kill must be retained up to and through the difficulty. *Long* v. *State,* 52 Miss., 23; *Lofton* v. *State,* 79 Miss., 734; *Cannon* v. *State,* 57 Miss., 154.

The court allowed the district attorney to prove that Arthur Orr, indicted in the same true bill with defendant on trial, was under bond and was out of the state and had defaulted at the time of trial. This was manifestly error. Pulpus could not

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Opinion of the court.

be responsible for the conduct of his codefendants. Pulpus not only went to Okolona and surrendered himself to the sheriff; he was released under bond and was present for trial. Even on the conspiracy theory one defendant, or conspirator, cannot be held responsible for the conduct of another after the supposed conspiracy is ended. *Spies* v. *People,* 3 Am. St. Rep., 487, and cases there cited.

William Williams, attorney general, for appellee.

[The reporter has been unable to find the brief of the attorney general.]

CALHOON, J., delivered the opinion of the court.

The defendant and Alex Pulpus and Arthur Orr were jointly indicted for the murder of George Anderson. At the next term, Isaiah Gillespie was separately indicted for this same offense. We have only to do with the case of Austin Pulpus, who was separately tried. This defendant and George Anderson, on the day preceding the homicide, were engaged as laborers in ditching, when some difficulty occurred between them, and Anderson struck him on the head with a spade, inflicting a bad scalp wound. After the blow Anderson threatened to kill Austin Pulpus. Only these two were engaged in this trouble. Austin Pulpus went to a doctor and had his head shaved and wound sewed up, and there is no evidence to show a conspiracy between Austin Pulpus, Alexander Pulpus, Arthur Orr, Isaiah Gillespie, Jesse Wilson, and Fee Wilson to perpetrate the homicide, but the evidence of conspiracy, if there be any such, is exceedingly unsatisfactory. On the night of the day when the blow with the spade was inflicted on the defendant, he armed himself with his father's pistol, as he says, for the purpose of being in condition to defend himself if Anderson undertook to carry out his threat.

All of the persons mentioned, including defendant, were at Joseph Randle's house on the next morning, which was the day

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on which the homicide was committed. The most of them had rabbit sticks, and say they hunted rabbits as they came through the fields. George Anderson was at work there, and the defense showed by testimony that they saw him and spoke to him. All these parties ditched for Joseph Randle on the afternoon when the first difficulty occurred, and it is said, on the part of the defense, that they wanted Joseph Randle to go down to the ditch to see about measuring up the work, and so Randle and Isaiah Gillespie went on the road, and the others through the fields. The measuring was done at the ditch, and Randle was the first to leave the ditch, going home. Soon after, Austin Pulpus, on account of his head paining him, started home, and with him went Alexander Pulpus, Arthur Orr, and Fee Wilson. All started home by the road which went by Randle's house, but Wilson stopped, before the point where the road passed Randle's house, at another house to get a drink of water. Orr and Alexander Pulpus, going in advance of Austin, had passed George Anderson when Austin came up.

A witness was permitted to state, over objection, that, in answer to his question to Fee Wilson whether they were going to report Anderson for the blow with the spade, he said, "No," they were "going to get him." This was in the absence of defendant or any of the party, and this was error.

There was nothing to show that the presence of the party was other than accidental. On the appearance at Joseph Randle's house, when the killing occurred, the state offered evidence, somewhat conflicting, to the effect that Austin went up to Anderson and asked him if he was done with the row, to which Anderson answered, "Yes," and that Austin then threw a club stick at him twice, and that then Anderson threw a frow at Austin, when Austin shot him twice, first in the knee, and then in the back. Another witness for the state testifies that Austin first threw a stick, and next a brick, at Anderson, and then Anderson threw a frow at him, and that both parties were standing up when the shooting was done.

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Opinion of the court.

The testimony for the defense is to the effect that Austin, as he passed Anderson, who was working at a crib with the frow, was hailed by Anderson, who said he wanted to settle that little "rucus," when Austin said he thought it was settled, to which Anderson replied, "I meant to kill you, and, God damn you, I am going to kill you," when defendant turned to go away, and Anderson threw the frow, striking him in the back and knocking him down, and that, while he was down, Anderson advanced on him with an axe raised to strike, and Austin, while down, and while Anderson was so advancing, shot him twice. There seems no doubt that Austin was struck in the back with the frow, and there is no doubt either that both the pistol balls ranged upwards, one striking just above the kneecap and going up into the groin, and the other striking at the base of the spinal vertebræ and going up inside of the body.

There is conflict in the evidence as to the location of the axe and frow and the hats of the men immediately after the killing. It is perfectly plain that the wounds from the pistol could not have been inflicted by the man who used the pistol if he had been standing up.

Under this presentation of facts, the court gave the following instruction at the instance of the state: "The court instructs the jury that, if they believe from the evidence in this case, beyond a reasonable doubt, that Austin Pulpus was hunting George Anderson to kill him, armed with a deadly weapon provided for that purpose, and that, when he found Anderson, he provoked a difficulty with Anderson, or was the aggressor in the difficulty in which he killed Anderson, then he is guilty of murder, even though he killed Anderson in self-defense, and the jury should so find." We think, on the evidence in this record, the granting of this instruction was fatal error. *Lofton* v. *State,* 79 Miss., 723, 31 South., 420, and the other citations in the briefs for appellant. It must be quite an overwhelming case for the state on the facts to keep this instruction from being

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Statement of the case.

reversible error. It wholly excludes any consideration of the doctrine of *locus penitentiae,* even where, as here, there is evidence of an abandonment of the conflict. It is not strictly correct as written. One may provide himself with a deadly weapon and hunt another, with design to kill him with it, and provoke and be the aggressor in the encounter in which he kills the other, and still, in the progress of the difficulty should not be denied the right of self-defense, if the killing be not pursuant to the original purpose to kill. If he abandons the conflict, and is fleeing from it in good faith, and not for vantage, he may defend himself from threatened death or great bodily harm. *Lofton* v. *State,* 79 Miss., 734, 31 South., 420.

We think it was error to permit the state to show that Arthur Orr, who was jointly indicted with appellant, and was under bond for appearance, was out of the state, and not present pursuant to his bond. *People* v. *Stanley,* 47 Cal., 114, 17 Am. Rep., 401, and the other citations of counsel's brief.

Reversed and remanded.

MASON LANE, ALIAS JEAN SYKES, v. STATE OF MISSISSIPPI.*

CRIMINAL LAW. *Bigamy. Indictment. Defense. Marriage, prior to first one charged.*

If the first marriage charged in an indictment for bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder.

FROM the circuit court of Claiborne county.

HON. GEORGE ANDERSON, Judge.

Lane, alias Sykes, was indicted, tried and convicted of bigamy, and appealed to the supreme court. The facts, upon

* This case was the last one decided in the old capitol, first occupied in 1839, and from which the state government removed in September, 1903.

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Brief for appellee.

which the case was decided, are stated in the opinion of the court.

J. McC. Martin, for appellant.

The first essential element of bigamy is a valid marriage, entered into by the defendant prior to the alleged bigamous marriage. An indictment for bigamy cannot be sustained where the prior marriage was void. *Davis* v. *Com.,* 13 Bush (Ky.), 318; *Hull* v. *State,* 7 Texas App., 593; *Breakey* v. *Breakey,* 2 U. C. Q. B., 353.

It is clear that unless the first marriage be valid, the crime of bigamy cannot be committed. 1 Roscoe's Criminal Evidence (8th ed.), 454; *Beggs* v. *State,* 55 Ala., 108; *Cooly* v. *The State,* 55 Ala., 162; *People* v. *Beevers,* 99 Cal., 286; *Shaffer* v. *State,* 20 Ohio, 1; *State* v. *Cone,* 86 Wis., 498.

If the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is a nullity, and the second marriage laid in the indictment cannot constitute the offense of bigamy. *State* v. *Goodrich,* 14 W. Va., 834; *Madison's Case,* 1 Hale, 693; *Commonwealth* v. *McGrath,* 140 Mass., 296; *People* v. *Chase,* 27 Hun. (N. Y.), 256.

Where A marries B, and afterwards marries C during B's life; and still afterwards, when divorced from B, but during C's life, marries D, the last marriage is not bigamous, because the second was void. *Halbrook* v. *State,* 34 Ark., 511.

J. N. Flowers, assistant attorney general, for appellee.

The case has been carefully gone over and the books have been searched to a considerable extent to find some authority to uphold the action of the court below in requiring the accused to submit his case to the jury after the admission on the part of the state that when he married Rosa Pitts, in Arkansas, he had a living lawful wife in the person of Patti Morris, of Texas. No such authority has been found; on the other hand, we find

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Opinion of the court.

that the rule contended for by appellant has been recognized by this court in *Crawford's Case,* 73 Miss., 173.

The Encyclopedia of Law writers did not cite a single case *contra.* 4 Am. & Eng. Enc. Law (2d ed.), 38.

It is a condition and not a theory that confronts us.

We submit the case without further argument.

WHITFIELD, C. J., delivered the opinion of the court.

The rule is thoroughly settled that one indicted for bigamy must be acquitted on that indictment if he can show that the first mariage alleged in the indictment is void by reason of the existence of a prior lawful marriage, still existing. *State* v. *Goodrich,* 14 W. Va., 834; *Commonwealth* v. *McGrath,* 140 Mass., at pages 297, 298, 6 N. E., 515; Am. & Eng. Enc. Law (2d ed.), vol. 4, p. 38; *Crawford's Case,* 73 Miss., 172, 18 South., 848, 35 L. R. A., 224. In *Goodrich's Case, supra,* the court said: "The defense which the prisoner sought to establish by the evidence which the court rejected was that he had, on the 30th of April, 1873, in Union county, Ohio, been lawfully married, according to the laws of Ohio, to Sarah Snodgrass, and that she was still living, and that this marriage was in full force when he was married, on the 29th day of November, 1874, to Frances L. Smith, in Wisconsin; that he (the prisoner) being then a married man, this marriage to Frances L. Smtih was a mere nullity, and absolutely void *ab initio.* The indictment alleged the offense of the prisoner to be the marrying by the prisoner, on May 5, 1877, in Iowa, of Clara Allen, while his wife, Frances L. Smith, was living. It was incumbent on the state to show that Frances L. Smith was his lawful wife, and the prisoner's defense, sought to be established by the evidence rejected by the court, was that Frances L. Smith was never the lawful wife of the prisoner, as he was a married man when he married her. If the first marriage laid in the indictment was a nullity, then the second marriage laid in the indictment could

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Opinion of the court.

not constitute the offense of bigamy; and, if the prisoner was a married man when the first marriage charged in the indictment took place, this marriage was an absolute nullity in Wisconsin."

The attorney general, with that commendable frankness which has always characterized his conduct of cases at this bar, confesses that this error is fatal. The authorities speak but one voice on the subject. The case made here is this: The indictment charges that the appellant, on the 12th of January, 1903, married, in Mississippi, Teresa Whetstone, having theretofore married Rosa Pitts, Rosa Pitts being alive at the time of the marriage to Teresa Whetstone. The evidence shows that appellant was married on the 6th of September, 1900, to Patty Morris, at Carville, in the state of Texas; second, that appellant married Rosa Pitts, at Russellville, in the state of Arkansas, subsequently, whilst Patty Morris was still living and his lawful wife; and, third, that afterwards, whilst both of these women were alive, he married in this state Teresa Whetstone. Under the authorities cited upon these facts, it is obvious that the court should have given the twelfth charge asked by the defendant, which is, in effect, a peremptory charge. The first marriage alleged in the indictment being the one with Rosa Pitts, and that marriage being void because appellant had theretofore been lawfully married to Patty Morris, who was then living, and who was also living at the time of the marriage to Teresa Whetstone, the defendant could not be convicted of bigamy under this indictment and proof.

Reversed and remanded.

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

OCTOBER TERM, 1903.

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STATE EX REL. EARL BREWER, DISTRICT ATTORNEY, *v.* RICHARD F. ABBAY ET AL.*

1. PRIMARY ELECTION. *Laws* 1902, *ch.* 66, *p.* 105. *Executive committee. Mandamus. Recanvas of returns. Defeated candidate.*

A defeated candidate for a nomination, under the primary election law (Laws 1902, chap. 66, p. 105), having knowledge of the facts which he claims rendered the successful candidate ineligible, who fails to present them to the executive committee of the party at the time it meets to canvass the returns and declare the result, cannot because of such facts afterwards, by mandamus, compel the committee to reassemble and review its conclusion, although section 14 of said law requires the committee to investigate and correct wrongs in a primary election.

2. SAME. *Nominations declared. Legality of votes adjudicated.*

Where the party executive committee, under said law, declares a candidate the party nominee it necessarily adjudicates as legal the votes cast for him.

FROM the circuit court of Tunica county.

HON. SAMUEL C. COOK, Judge.

The state, on the relation of Earl Brewer, district attorney, was the plaintiff in the court below. Richard F. Abbay, chairman, and other members of the Democratic Executive Commit-

* This was the first case decided in the new capitol, the building, the erection of which was begun January 1, 1901, and into which the state officers were moved in September, 1903.

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Brief for appellant.

tee of Tunica county, were defendants there. The suit was a proceeding for a mandamus to compel Chairman Abbay and the other members of the committee, appellees, to reassemble and recount the votes which had been cast at a primary election in Tunica county for candidates for the democratic nomination to the office of county treasurer of said county.

At said election there were but two candidates for the nomination to said office, one Tucker and one Robertson. The petition averred that Tucker was ineligible to receive said nomination because he was a member of the executive committee of the democratic party, which was holding the primary election; that after the election the democratic executive committee met, though it is not averred that Tucker attended the meeting, and that a majority, without canvassing the votes cast, had accepted the returns of the election managers and had adjudged that Tucker received more votes at the primary election than Robertson, and had declared Tucker to be the democratic nominee for said office. The petition prayed that the democratic executive committee of the county be compelled to reassemble and investigate the matter of fact as to whether Tucker was ineligible to be nominated because he was a member of the democratic executive committee of the county, and if it should be found that he was ineligible, that the committee then be required to declare Robertson the democratic nominee for said office. To this petition there was a demurrer on the grounds following: First, that the committee was shown to have already performed its duties. Second, that the committee had no power to reject votes which were counted by the election managers, and third, that there is no law making votes cast for an executive committeeman illegal. The court below sustained the demurrer and rendered a final judgment dismissing the petition and the plaintiffs appealed to the supreme court.

Calvin Perkins, for appellant.

The record in the case at bar shows that there were only

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twelve executive committeemen, and there were more than twelve county offices for which candidates were to be nominated. Now, if one executive committeeman had the legal right to be a candidate for nomination to an office at that election, all of them had that right, and what a travesty it would be on the efforts of the legislature to "secure fairness in party primary elections" if it should turn out that it has passed a law which permits this to be done.

When the primary election law provides that the county executive committee shall discharge the functions imposed upon the election commissioners, and makes that provision in the same section of the act in which it had already been provided that the primary election "shall be governed and regulated by the election law," it thereby, in terms, says that both of the regulations contained in section 3634 of the code shall be applicable to the county executive committeemen.

It is altogether unnecessary, for the solution of the question under discussion, to determine whether the section of the code named is a penal statute or not. If it be a penal statute and applies a penalty to commissioners of election, then, in the language of section 1 of the primary election law a like penalty is placed upon executive committeemen, because the words of that act are that executive committeemen "shall be subject to all the penalties to which county election commissioners are subject." If it be not a penal statute, then it must be liberally construed, because looking at "the entire legislation on the subject-matter, its policy and reason, as well as the text," it is within the "scope and object, spirit and meaning" of the primary election law that executive committeemen shall be ineligible as candidates, and that all votes cast for them shall be illegal and shall not be counted. Or, to put it more succinctly, if the section of the code under consideration be a penal statute, it is within both the letter and the scope of the primary law, and if it be not a penal statute, then it is within the scope, although not within the let-

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er, and in either event must be construed as applicable to the executive committee.

Even the election commissioners, with their restricted powers, were held in *Oglesby* v. *Sigman,* 58 Miss., 502, to be authorized to go behind the returns to the extent of rejecting any ballots which, upon their face, appeared to be illegal, and most clearly, under section 14 of the primary election law, the executive committeemen are not mere ministerial officers, and not merely *quasi* judicial officers, but are authorized and required to hear evidence whether unauthorized persons have been permitted to vote, whether illegal ballots have been cast, and whether any act has been done in relation to the primary election by which any fraudulent result has been obtained, and after such hearing to correct the wrong. "To hear evidence and correct the wrong" is a strictly judicial function, and by said section 14 the county executive committee is made a court with plenary powers as to the subjects in that section enumerated—viz.: whether unauthorized persons have been permitted to vote, illegal ballots cast, or any act done with regard to the primary election by which any fraudulent result has been obtained. Not only is it a court with full powers to hear and determine, but it is also made the court of last resort—no appeal is given.

But it is argued that the petitioner was not entitled to the writ of mandamus, because it appeared on the face of the petition that the executive committee had canvassed the returns and determined and declared the result. The allegations of the petition are very distinct and clear that there was no canvass of the returns.

The error of counsel for appellees, on this point, consists in assuming that when section 6 of the primary election law provides that the executive committee "shall receive and canvass the returns," the word "returns" has reference only to "the result of the election in the several election districts, certified and signed by the managers and clerks." There is nothing in

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Brief for appellees.

the primary election law itself defining the meaning of the word "returns" in this context, but as that election is to be "governed and regulated" by the general election law, we must look to the general election law for the definition. Code 1892, § 3670.

Evidently the committee did not know that it was a court, vested by said section 14 with plenary powers, to hear evidence and right the wrong, or, if they did not know it, they violated their duty in assuming to act as mere ministerial officers, with no power except to add up the results of the election as certified to them by the managers and clerks, and announce the names of the nominees arrived at by such summing up.

It is also argued that the demurrer ought to be sustained, because, it was alleged, the petition did not aver that Tucker was present and participated in the canvass of the returns by the executive committee. The language of the petition is: "He acted as such with reference to the said primary election." This is substantially the language of the statute. Code 1892, § 3634.

It is also argued that the application to correct the wrong came too late, but it can never be too late until after the executive committee has canvassed the returns, or until after the time fixed for printing the ballots for the general election. The only limitation fixed in section 14 of the primary election law is that the executive committee shall "promptly investigate and correct the wrong." The time to correct the wrong is while the canvass is progressing, and certainly an application for such correction is in ample time if it is made before the canvass has been commenced.

F. A. Montgomery, Jr., for appellees.

The first question presented in this case is: Can the democratic executive committee of a county be compelled, in any case, to reassemble and canvass the returns of a primary elec-

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tion and reannounce the result, and redeclare the nominee of the party, when it has already assembled at the time and place required by law, and from the returns has declared the result, and announced the nominee of the party?

The petition in this case shows that the committee met at the time and place required by law, that there was delivered to them by the proper authorities at the time and place the tally lists, tally sheets, lists of voters, poll books, ballots, and ballot boxes; and that on motion, duly seconded, they accepted the tally lists, which was the statement of the result at the several voting precincts, as correct; and on those declared the result.

It is clearly shown by the petition that Tucker received a very large majority of the vote cast, and that he was declared the nominee.

These facts, that he was nominated, that the committee had declared him the nominee, at the time and place required by law, are not disputed by this petition at all. That the committee has acted in the matter, and finally acted, is fully shown by the petition.

Can they, therefore, now, even if they have reached their result by a misunderstanding of the law, or have declared a man nominated who was not entitled to be nominated, be compelled by mandamus to reassemble and undo what they have done and declare another man nominated? 10 Am. & Eng. Enc. Law, 746, 747, 748, 749, 750, 751; *Oglesby* v. *Sigman,* 58 Miss., 502; High on Extraordinary Legal Remedies, secs. 49, 50, 53.

But it is argued by the counsel for the appellant, that section 14 of the primary election law, conferred upon the executive committee certain judicial functions; and that to that extent they are not ministerial but judicial officers. And that the question of the eligibility of Tucker to be nominated for county treasurer was a judicial question which they should decide. And, therefore, as they have not decided this question either way they can be mandamused to meet and do so.

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Opinion of the court.

If it be true that Tucker was ineligible to the nomination, and that the ballots cast for him were illegal and should not be counted, and if the executive committee had the authority to hear and determine this question, yet they cannot now be compelled to reassemble and consider an objection which was not made at the meeting of the committee.

Mandamus will not lie to compel judicial discretion of an officer. *Swan* v. *Gray,* 44 Miss., 393.

WHITFIELD, C, J., delivered the opinion of the court.

Whilst it is true that the petition avers that the executive committee made no canvass of the returns, other averments of the petition show that the executive committee, besides ratifying what the election officers did, tabulated and added up the votes cast for Tucker and Robertson, respectively, and declared Tucker the nominee. The very gist of the complaint is that the executive committee did not declare the votes cast for Tucker legal or illegal, and did not refuse to count them. But we think it clear that the act of declaring Tucker the nominee, after tabulating and adding the votes, necessarily involved a declaration that the votes cast for Tucker were legal. How could they have declared him the nominee without finding the votes cast for him to be legal? What the petition prays for is, in effect, that the executive committee be commanded to reconvene, to hear the evidence on the single point whether Tucker was a member of the executive committee, and acted as such, and, if he did, to declare the votes cast for him illegal, and not count them. The very essence of the prayer is that the executive committee shall declare the votes cast for Tucker illegal, and not count them. But it is perfectly obvious from the averments of the petition that Tucker was a member of the executive committee; that he did act as such; that the executive committee were bound to have seen, upon the face of the returns, exactly how many votes were cast for him; and that, in full view of this knowledge,

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they nevertheless declared him the nominee. There is necessarily involved in this action the finding of the executive committee that those votes were legal, and it logically follows that the real complaint is not so much that the executive committee have failed to decide whether the votes cast for Tucker were legal or illegal, as that they did decide that those votes were legal, and that that was wrong; and plainly this would be to employ the writ of mandamus, not to compel action, but to control discretion in acting.

There is another fatal objection to the granting of the writ. The application came too late. Taking all the provisions of the law together, the scope and intent require, ordinarily, that the complaining party shall present his evidence and make his objections at the first meeting of the executive committee after the primary election. The committee is directed "promptly" to "receive evidence and correct wrongs." The very nature of the case requires prompt action all round. The intent of the law is that none but eligible candidates shall appear on the party ticket, so as to avoid confusion later, and that whatever inquiry is had shall be had at the first appropriate time, to wit, the first meeting of the executive committee after the primary election has been held. It seems clear from the averments of this petition that Robertson knew everything touching the elegibility of Tucker quite as well before the primary election was held as afterwards, and yet not a single objection was made—no evidence was offered by him to be introduced—at the meeting of the executive committee. No excuse was shown, none existed, why he should not have offered his evidence to prove that Tucker was a member of the executive committee at the first meeting of the executive committee, and why he should not have then interposed his objections based on his ineligibility. That was the time for the executive committee to have "received his evidence and corrected any wrong" complained of, if any existed. Yet he waited until about twenty days after

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the primary election before filing his petition for this writ. We will not be understood as saying that there may not be cases in which, after the first meeting of the executive committee has been held, the writ may be used to compel the executive committee to reconvene to receive evidence and to correct wrongs. There may occur cases in which the complaining party may not have known, with the exercise of all reasonable diligence, of the fraud or illegal act vitiating the election; and it must be conceded that the power conferred upon the executive committee of the county for the correction of wrongs in a primary election are much broader than those conferred by the old law on the election commissioners for the very obvious reason that in case of an election the law provides a mode for contesting the result of that election, and that it is in that contest that the wrongs and frauds committed are to be corrected. But in the case of a primary election there is no tribunal vested with power to determine who is to be the party nominee—to correct the wrongs and frauds bearing upon the solution of that question—save only the executive committee of a county. However it may be in the case of a complaining party who had no knowledge of the wrong or fraud until after the executive committee had met, it is certain that the intent and scope of the act require, in the case of one who did have such knowledge, that he shall make his objections and offer his evidence at the first meeting of the executive committee of the county after the primary election has been held.

It results that the judgment must be affirmed.

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Syllabus.

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ALABAMA & VICKSBURG RAILWAY COMPANY v. JAPHET M. POUNDER ET AL.

1. COMMON CARRIER. *Delay in shipment. Pleading. Negligence.*

A declaration against a common carrier charging an unreasonable and negligent delay in the shipment of freight, describing the freight and the points from and to which and the persons by and to whom the shipment was made, is not demurrable for a failure to state the facts of which the charge of negligence is predicated.

2. SAME. *Delay in shipment. Notice of arrival.*

If a carrier, being under duty by universal and well understood custom to notify the consignee of the arrival of freight at the point to which it has been shipped, negligently delay giving such notice, it will be liable as for a delay in the shipment.

3. SAME. *Consignee's representatives. Demand. Wrong car.*

A carrier, under duty by custom to give notice of the arrival of freight, having knowledge that the consignee has a local agent and business representative at the point to which the goods had been shipped and received and who had repeatedly called therefor, is negligent if it fail to notify such representative of the arrival of the goods, although the agent called for the freight by the wrong car number, if the freight to the knowledge of the carrier had been transferred en route to a car of another number.

4. SAME. *Variance. Appellate practice.*

In an action against a carrier by a consignee for the difference between what the plaintiff would have sold the goods for upon prompt delivery and what he was compelled to sell them for after delayed delivery, a variance between the declaration and the proof as to the name of the purchaser of the goods cannot be availed of for the first time in the supreme court.

FROM the circuit court of, first district, Hinds county.
HON. ROBERT POWELL, Judge.

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Brief for appellant.

Pounder and others, appellants, partners doing business under the name "J. M. & C. B. Pounder," were plaintiffs in the court below; the railway company, appellant, was defendant there. From a judgment in plaintiff's favor, the defendant appealed to the supreme court. The opinion of the court states the facts of the case.

McWillie & Thompson, for appellant.

The court below manifestly could not have rendered judgment against appellant on the idea that the proof showed a delay in the shipment, and it must have proceeded, in rendering the judgment, upon the idea that there was an unreasonable delay *in delivering the goods after they reached Jackson.* Even if appellant was in any way derelict in its duty *about delivering the goods after they reached Jackson,* such dereliction is not sued for and is outside of the declaration.

The court below erred in overruling appellants' demurrer to the declaration. It does not show when the Alabama & Vicksburg Railway Company received the freight or the car containing it. It is true that the declaration avers that by the joint negligence of the Mobile & Ohio Railroad Company and the Alabama & Vicksburg Railway Company, the car was dealyed, but there is no averment or charge that the two railroad companies were partners, or had any connection whatever with each other. A mere charge of negligence against two parties, without showing that they were under joint obligation, were partners, or in some way responsible each for the obligation of the other, is not a sufficient averment in the declaration to make it a cause of action against either. Facts must be pleaded. In this case, so far as the negligence is concerned, no facts are stated, and the demurrer should have been sustained.

When we come to look at the facts, we find that Mitchell & Company claim to have been the sales agents at Jackson of Pounder & Company, the plaintiffs. It will be noticed that it

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is quite difficult to determine from the record whether Mitchell is to be treated as a purchaser of the ties or as the agent of Pounder to sell them to other persons. *One thing is certain, Mitchell & Company were not both the selling agents of the plaintiffs so far as concerns these ties, and at the same time the purchasers of the ties from the plaintiffs.* The judgment in this case is predicated of the idea that Mitchell was the purchaser of the ties, but at the same time, the learned court below seems to have treated him as the agent of the plaintiffs, to whom notice should have been given of the reception of the ties at Jackson, in order to hold the railway company negligent in not delivering the ties earlier than upon the date upon which they were delivered. We insist that Mitchell & Company must stand in the one position or the other. If Mitchell was the purchaser of the ties, then the railway company was not negligent in failing to notify him or his company that the car of ties consigned to appellees had been received. If, on the other hand, Mitchell & Company were the selling agents of the plaintiffs, then the case must fail as against the railway company, because there was no sale of the ties by the plaintiffs, and consequently no loss sustained which they would not have sustained had the ties been delivered ten days before they were, since a man's loss who holds property unsold during a depreciating market must fall upon himself. It will be observed that the declaration avers that plaintiffs had sold the car of ties to Mitchell & Company of Jackson, and a judgment could not rightfully be rendered against the railway company which had for its basis a fact negatived by the declaration. When the court below, therefore, went off on the idea that Mitchell & Company ought to have been given notice as Pounder's agents that a car load of ties had reached the station, it went in the face of the declaration itself, because by the terms of the declaration Mitchell & Company were not the agents of the plaintiffs, but the purchasers of the ties from them.

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Brief for appellees.

The court below held that the company was derelict in not informing Mitchell that car 16,071 had reached Jackson, and that, too, when Mitchell had made no inquiry for such car, but had specifically, as he himself testified more than once, inquired for a car of a different number. This is where the court below went outside of the declaration, and gave the erroneous judgment which it rendered upon the misconception that Mitchell was the agent of the plaintiffs, that the railway company knew through its officials that Mitchell was the plaintiff's agent, and that it was guilty of negligence in not informing Mitchell of the arrival of car No. 16,071. To treat Mitchell as the agent of the plaintiffs is to ignore the charges on the subject in the declaration, and to give plaintiffs a recovery against the facts averred by them as the basis of their suit.

The judge below allowed himself to be confused, and, in order to reach the conclusion culminating in the judgment appealed from, treated Mitchell & Company as agents to whom notice should have been given, under all of the facts and circumstances of the case, when they were not agents in any sense. And further on the learned judge inconsistently adopted the idea that Mitchell & Company were purchasers of the ties in question, the judgment appealed from being predicated of both ideas. That Mitchell & Company were the purchasers was assumed to show a loss, and that Mitchell & Company were the agents of the plaintiffs was assumed in order to adjudge that notice should have been given them of the reception of a different car from the one for which they inquired.

Watkins & Easterling, for appellees.

We claim that this case is simply one of disputed facts, and these facts having been determined in our favor by the judgment of the court, they will not be reviewed in this tribunal. *Dickson* v. *Vook,* 47 Miss., 220; *Walker* v. *Walker,* 67 Miss., 533.

These facts are established:

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Brief for appellees.

1. That it was the custom of the A. & V. R'y Co. to notify consignee if they knew him, and if not, to notify his agent or person who was in the habit of receiving freight.

2. That Mitchell & Company were either the sales agents of Pounder & Company or they were the persons in the habit of receiving the freight.

3. That the A. & V. R'y Co. had been in the habit of notifying Mitchell & Company that J. M. & C. B. Pounder's freight was on the track.

4. That Mitchell called and inquired at various and sundry times, between August 31 and September 8, to ascertain if the appellant had any ties on its tracks for Pounder & Company.

Considerable doubt arises in the authorities as to whether or not it is the duty of the common carrier to notify a consignee of the arrival of goods. Some authorities contend one way and some another. However, it is not necessary for the court to pass upon this question, since all authorities agree and our court holds that where there is an established custom, that either the consignee or his agent shall be given notice, and the liability as carrier is not ended until notice is given. *Railroad Co.* v. *Tyson,* 46 Miss., 729; *Railroad Co.* v. *White,* 88 Ga., 814; *Frank* v. *Grabd,* 57 Mo. App., 181; *Railroad Co.* v. *Cotton,* 29 Ind., 498; *notes to McKinney et al.* v. *Receiver,* 90 N. Y., p. 267.

"Where it appears that the consignee of goods demanded their delivery several times and the carrier, without sufficient excuse, failed to deliver them, and the goods were afterwards destroyed by fire, the carrier was liable for the goods destroyed." *Railroad Co.* v. *Arms,* 15 Neb., 69; *Railroad Co.* v. *McGuire,* 79 Ala., 395; *Central Trust Co.* v. *Railroad Co.,* 70 Fed., 764; *Railroad Co.* v. *Morrison,* 55 Am. Rep. 252.

Courts will not set aside verdicts on grounds of variance, unless parties have been misled in making their defense, and appellant was not misled, but had witnesses on hand, in order

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to meet the very case that we made, and there is not one intimation in the record that appellant was surprised at or misled by the testimony of the plaintiffs in the court below in reference to their contractual relations with Mitchell & Company. Upon the other hand, it is testified by Mitchell, and absolutely undisputed, that appellant knew exactly the kind of business he was carrying on with Pounder & Co. Code 1892, § 1718.

And certainly the appellant was not misled in making defense. That being true, the variance, if any variance there was, was immaterial and harmless as to the defendant, and being harmless to the defendant, and its liability having been the same, it certainly affords no justification for reversal of the judgment of the court below.

The appellant's attorneys, in their brief, spend much time upon this point: They say that the declaration charges an unreasonable delay in the shipment of the ties, the proof shows, if anything, an unreasonable delay in delivering the goods after they reached Jackson.

Now, in reply to that, we will say, that in accordance with the authorities which we cited above, the delay in delivering the goods after they reached Jackson, that is to say the failure to notify Mitchell & Company or the failure to tell Mitchell & Company that the goods were there, was part of the shipment of goods, that is to say, it is as much a breach of a carrier's duty in the shipment of goods to fail to notify the consignee, where the custom is to give notice is shown, or failure to tell the consignee that his goods are there when he called, as it is to delay the goods in transit.

The declaration alleged that the defendants were negligent in that they unreasonably delayed the shipment, which is sufficiently definite, it not being necessary for us to say why they delayed it, as those are facts which lie exclusively within the the knowledge possibly of the defaulting carrier. So that when we informed them that they were negligent in that they delayed

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this shipment of ties unreasonably, the allegation is sufficiently definite; and besides all this, all of the authorities hold that a general allegation is all that is necessary anyhow, and upon this point we submit the following authorities: *Railroad Co.* v. *Blount,* 24 Ill. App., 438; *Lucas* v. *Wattles,* 49 Mich., 380; *Company* v. *Crick,* 47 Ind., 368; *McGongle* v. *Kane,* 20 Cal., 292; *Railroad Co.* v. *Vincent,* 58 Neb., 171; *Railroad Co.* v. *Walker,* 113 Ind., 196; *Homer* v. *Myer,* 100 Cal., 592; *Railroad Co.* v. *Davis,* 9 So., 252; *Railroad Co.* v. *Lazerus,* 6 So., 877; *Lachems* v. *Adams Ex. Co.,* 72 Mo. App., 13; *McKanley* v. *Davidson,* 10 Minn., 418; *Keokuk* v. *Packing Co.,* 82 Mo., p. 40; *Peck* v. *Weeks,* 34 Conn., 145; *Railroad Co.* v. *Windheim,* 12 S. Western, 109.

TRULY, J., delivered the opinion of the court.

This case was tried in the court below before the judge, a jury being waived. So far as material to the decision of this litigation, the facts are as follows: On August 8, 1901, Mitchell & Co., who were the sales and distributing agents of the appellees, Pounder, effected a sale of a quantity of cotton ties at $1.18 per bundle. The appellees ordered these shipped, and accordingly 1,000 bundles of ties were shipped from Charlotte, N. C., on the 19th of August, 1901, and delivered to the Seaboard Air Line car No. 11,155, and consigned to J. M. & C. B. Pounder, at Jackson, Miss., to shippers' order, draft and bill of lading attached, sent to one of the banks in Jackson, to be taken out on receipt of goods by Mitchell & Co. Car No. 11,155 was damaged in transit, and on the 23d of August, 1901, the Mobile & Ohio Railroad Company, at Montgomery, Ala., refused to accept that car, and thereupon the ties were reloaded into Seaboard Air Line car No. 16,071, but the Mobile & Ohio Railroad Company accepted this car under the original waybill. When car No. 16,071 reached Meridian, the Alabama & Vicksburg Railway Company, appellant, refused to accept

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the car under the defective waybill, and demanded that it should be corrected. This was done, and the car No. 16,071 reached Jackson on the 31st of August, 1901, the same day that it was received by the appellant company at Meridian. According to the well-established and undisputed custom of the railroad company, and in its usual course of business, which requires the consignee to be notified of the receipt of freight, the railroad agent notified J. M. & C. B. Pounder by postal card, through the mail, but did not notify Mitchell & Co., who were known to the railway company to be the agents and representatives of appellees. On each day from September 1st to September 6th Mitchell asked, in person, at the depot of appellant, whether car No. 11,155, loaded with cotton ties for Pounder, had been received. The answer in each case was that it had not, Mitchell also testifies that he asked the agent of the company if there were any other ties for Pounder, and received the same reply. The proof showed further that the sale of the ties had been effected to various parties by Mitchell & Co. at the figure named heretofore, to wit, $1.18 per bundle, but that, on account of the delay in the shipment, the price of ties had declined to such an extent that Mitchell's vendees refused to accept. It further appears that, if the ties had been received by Mitchell on or prior to September 5th, he could have disposed of the ties at the figures named. Upon the trial it developed that when Mitchell by his own examination of the cars upon the track, found the car No. 16,071, he immediately made an investigation, which resulted in a few hours in ascertaining the cause of the mistake, but this discovery was made too late to carry out the sale as originally made. One of the members of the firm of Pounder came to Jackson shortly thereafter and succeeded in disposing of the ties, through Mitchell & Co., at 92 1-2 cents per bundle. A judgment was given for $250 for plaintiffs, this being the difference between $1.18, the original price agreed upon, and 92 1-2 cents, the price which Pounder was able to obtain in the

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Opinion of the court.

open market, all other claims for damages being disallowed. On the trial before the judge, all the facts were thoroughly investigated, and were decided by him adversely to the railway company. On appeal, three points are urged as error:

First. It is contended that the demurrer to the declaration should have been sustained, because of the failure to state the facts upon which the negligence of the railroad company is based. We think that the demurrer was not well taken, and was therefore properly overruled. It is not necessary that the declaration should detail the evidence by which the plaintiff expects to make out his case. The declaration avers an unreasonable and long delay in the shipment of the ties, and that this was negligence in the railroad company, and that damages to plaintiffs resulted therefrom. We think this charge, together with other facts set out in the declaration, sufficient in the case at bar.

Second. It is urged that the delay complained of was not in the shipment, but after the freight arrived at its destination, and therefore, under this declaration, the railroad company is not liable. It is true that, in point of fact, the delay occurred at the depot in Jackson after the car had arrived here, but we prefer to align ourselves with those authorities which hold that the duty of the carrier is not completed until consignee has been notified of the arrival of the freight. More especially is this the rule where, as in this case, a universal and well-understood custom to that effect is in force. Upon that branch of the case the case of *New Orleans, J. & G. N. R. Co.* v. *Tyson,* 46 Miss., 729, is decisive. It is contended by counsel for appellant that, even recognizing this rule, still it was complied with in this case by the notification which was sent by mail to Pounder. We think not. The fact that Mitchell, who was known to be the agent of Pounder, daily asked for cars of ties consigned to Pounder, was sufficient to put the railway company on notice, and it was negligence in its agents not to have notified him that

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a car of ties was there, consigned to Pounder. The appellant cannot shield itself with the argument that there was a difference in the number of the car for which Mitchell asked and the car which had been actually received in Jackson. The ties were the material thing that Mitchell was inquiring about. The car was simply the vehicle in which they were expected to arrive. Especially was it negligence in the railroad company not to inform Mitchell that the car had arrived, because the company had actual knowledge, through its agent at Meridian, that this was the same shipment of ties that had originally been shipped in car No. 11,155, and the railroad company had actual knowledge of the change of cars containing the shipment, because the waybill had been corrected, at its demand, to show the change. Undoubtedly, therefore, it was negligence of the railroad company which produced any loss entailed upon Pounder.

The third proposition which is contended for by counsel for appellant is, that the declaration avers that the sale was made by Pounder to Mitchell, while the proof upon the trial showed —so they contend—that the sale was made not to Mitchell, but by and through Mitchell & Co., as the sales agents and representatives of Pounder. Granted that this is so; how can it affect the liability of the railroad company? The point at issue is not to whom the sale was made, but were Pounder & Co. damaged by the negligence of the appellant? If it be granted that there was a variance between the allegation in the declaration and the proof upon the trial, the railway company had its remedy at that time to plead variance; and, if it appeared that it had been misled in any wise, it is not to be doubted that the plaintiffs would have been allowed to have amended their declaration upon proper terms. Code 1892, § 718. But the record shows that the appellant was not misled. The case was fought out upon its merits. The point of a variance cannot now be raised for the first time. *Greer* v. *Bush*, 57 Miss., 576. The judge

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Statement of the case.

found the facts against the appellant, and we find no error in law.

The judgment is affirmed.

JOHN H. LEVENWORTH v. GREENVILLE WHARF AND STORAGE COMPANY.

TAXATION. *Assessment. Ambiguity. Parol evidence.*

An assessment of land in these words, "Huntington & Le Valley, Add. Owner's name, Goyer Company. All section 9 and 10, Township ———, Range 18," cannot be shown by parol to mean lots 9 and 10 of Block 18 of Huntington & Le Valley's addition to the city of Greenville.

FROM the chancery court of Washington county.

HON. CARY C. MOODY, Chancellor.

Levenworth, appellant, was complainant, and the Greenville Wharf & Storage Co., appellee, was defendant, in the court below. The object of the suit was to cancel appellee's claim to lots 9 and 10, block 18, of the Huntington & Le Valley addition to the city of Greenville, as a cloud upon complainant's title and to confirm his tax title thereto. Complainant derived title to the land through a deed from the state land commissioner; the land having been sold to the state for taxes in March, 1899, for the taxes of 1898. Defendant answered the bill, setting up that the sale to the state for taxes was void, beacuse the lands were never delinquent for taxes, there never having been a valid assessment of them for the taxes for which they were sold. The assessment roll shows at the top of the page the words "Huntington & Le Valley Add.," "Sec.," "Township," "Range," and below the words "Goyer Co." (the parties assessed), "All," and under the word "Sec." the figures "9" and "10," and under

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Brief for appellant.

the word "Range" the figures "18." It was appellant's contention that the assessor intended by the description to describe lots 9 and 10, block 18, of the Huntington & Le Valley addition to the city of Greenville. Before final decree complainant made application to remand the cause to rules to take parol testimony to show that the land described in the bill and the land referred to on the assessment roll was the same land, and to explain the entries "9, 18," and "10, 18," and to show to what they applied. This was denied, and the bill was dismissed. From that decree, complainant appealed to the supreme court.

J. H. Wynn, for appellant.

Counsel for appellee in the court below relied upon the following authorities: *Hughes* v. *Thomas,* 29 So. Rep.; *Dodds* v. *Marks,* 63 Miss., 443; *Sims* v. *Warren,* 68 Miss., 452; and *McQueen* v. *Bush,* 76 Miss., 283. The law of the case is clear, and as announced in the foregoing cases entitled the complainant to a decree without further testimony than was introduced before the chancellor, and there is no ambiguity in the assessment and the assessment as appearing on the roll fully describes the land in controversy. The complainant sued for lot No. 9, block 18, and lot 10, block 18, of the Huntington & Le Valley addition to the city of Greenville; but it was contended that because the figures 9 and 10 describing the lots, and the figures 18 indicating the block, appeared, respectively, in the columns provided on the assessment roll for sections and ranges, and the words "lot" and "block" not being used in the description on this page, that the description could not be applied to the land in controversy. The court will see that the assessment is made on a common assessment roll used for assessing all lands in the county.

Now the words "Huntington & Le Valley Addition" are not in print, but are in writing, and wherever words written upon a printed form convey a different meaning from the printed form, the meaning of the written words must prevail. The writing

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of the words "Huntington & Le Valley Addition" at the top of the page described the land beneath as being in that addition. There can be no doubt about that. This is clearly not an assessment of lands in the country, for the township is omitted altogether, and there is no range 18 in Washington county, and this the court judicially knows. And the court will observe that on the particular page the words "Huntington & Le Valley Addition" are written over the words "section, township and range," and the words "section, township and range" are in fact written out as completely as if they had never appeared on this page. It is true that the word "addition" is not fully written out; that the word "Add." stands for addition is an abbreviation well known in general use and is shown by the testimony stands for the word "addition." Now, the court will further see that after the assessor had finished assessing lands in the country, on page 120 of the original assessment roll, he began on page 21 to assess lands in the city of Greenville, beginning with the "original town of Greenville" and going through the various additions, putting the word "lot" in the columns originally provided for sections, and the word "block" in the column originally provided for ranges, and writing the figures which described the lots in the column below the word "lots," and the figures which described the block below the word "block," but he did not always write the words "lot" and "block" at the top of the column, and this was unnecessary, for he wrote them when he began upon the original town and wrote them in many places thereafter, as will be seen on pages 122, *et seq.*, 128, 136, 137, 143 and 144, and it was not necessary for him to continue to write the words "lot" and "block" at the top of the columns, for he wrote them sufficiently to indicate clearly where the figures describing the lots appeared and where the figures describing the blocks appeared. It might as well be contended that he should have written the words "lot" and "block" over each particular piece of land assessed.

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Brief for appellee.

Leroy Percy, for appellee.

Appellant contends that the word "section," as it appears on the roll, should be read "lot," and that the word "range" should be read "block."

I know of no rule of construction as applied either to an assessment roll, or to any written instrument, under which this can be done. It is not an attempt to explain the language used in the roll, or to point out any clew given by it; not an attempt to explain the words of description, but to contradict them, to write them out, and to write in lieu of them the words which appellant states should have been written by the assessor. His contention merely is that the assessor intended by his description to describe the lands embraced in this suit. For the purpose of this argument granted, but I do not see that the appellant's condition is improved by the concession. It is absolutely immaterial and irrelevant what was the intention of the assessor. The sole question is, what official action did he take, as is evidenced by the roll that he was required to make.

As stated in *Sims* v. *Warren,* 68 Miss., 447, and the language seems to me to be applicable to this case, looking to the evidence in this case, we find nothing in it in aid of the assessment except the intention of the tax collector in making the sale, and this is an irrelevant and inconclusive matter, throwing no light upon the material inquiry as to what lands were assessed, nor do we think it would have been competent to show by parol the intention of the assessor, undisclosed, by what he did in fact do and record upon the memorial provided by law as the exponent of his action."

The appellant cannot claim, of course, that he has been in any way misled or prejudiced by the action of the assessor. He cannot garb himself in the apparel of an overreached or innocent purchaser so as to appeal to the court. When he sought to acquire appellee's land under the tax sale, he made the purchase relying upon the various officers charged with the

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Opinion of the court.

duty of assessing and selling for taxes having done their duty, and what they had done was open for his inspection, and he was cognizant of the fact that any invalidity in the assessment nullifies the tax sale under it; that the fundamental question always arises, Has there been a valid assessment of the land sold?

It may be that the court is entirely satisfied that the failure to properly describe this land resulted from the lamentable negligence of the officer charged with making the assessment; that he simply left the words "section" and "range" standing on the roll instead of erasing them and writing the words "lot" and "block" through indifference or ignorance, but the roll as made by him is the exclusive record provided by law as the exponent of his intention. From the facts of this record alone can that intention be derived.

CALHOON, J., delivered the opinion of the court.

The assessment roll shows, at the head of the page, the words, "Huntington & Le Valley Add.," and below this the words, printed, "section," "township," "range," and below this the names of the parties assessed, with the word "all," and under the column "section" the figures "9" and "10," and under the word "range" the figures "18." The appellant's claim is that this is a good assessment of all of lots 9 and 10 of block 18 of the Huntington & Le Valley addition to the city of Greenville. The words "lot and block" do not appear on the page, nor do they appear anywhere in the attempted assessment of that addition. We agree with the chancellor below that they cannot be supplied by parol testimony.

Affirmed.

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Brief for appellant.

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SARAH ANN CARVER v. CITY OF JACKSON.

1. MUNICIPALITIES. *Defects in streets. Notice.*

A municipality may have such constructive or implied notice of defects in its streets as to render it liable for damages resulting therefrom.

2. SAME. *Defects created by the municipality itself. Ordinary care.*

Where defects in a street were created by the municipality itself in the prosecution of a public work, and ordinary care would have discovered them, it is chargeable with notice of them.

3. EXCESSIVE VERDICT.

A verdict for four thousand dollars against a city in favor of a professional midwife and nurse, sixty-three years of age, for falling into a sewer ditch because of a defective temporary bridge, is excessive, in the absence of satisfactory evidence as to the extent and duration of her injuries.

FROM the circuit court of, first district, Hinds county.

HON. ROBERT POWELL, Judge.

Mrs. Carver, appellee, was plaintiff, and the city of Jackson, appellant, defendant, in the court below. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts are sufficiently stated in the opinion of the court.

McWillie & Thompson, for appellant.

The declaration alleges that the crossing "appeared to be safe," and the evidence for the plaintiff is that it appeared to be safe. Both the plaintiff and her companion, Mr. Porter, when they saw it and considered it safe, had the benefit of the light of day.

The defendant had fixed the crossing so as to be safe in the opinion of the servants of the city who arranged it and who

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Brief for appellant.

could only say whether or not it was safe from its appearance, and their affirmative conclusion was justified by that of the plaintiff and her companion.

A municipality is not an insurer of the safety of such crossings, and that all reasonable precautions had been taken by the defendant's servants is shown by the most indisputable evidence.

Had a special verdict on this question been allowable, we do not see how any member of the jury could have so stultified himself as to declare that the servants of defendant who fixed the crossing might not have reasonably concluded that the crossing was safe as arranged, and we venture the assertion that every member of this court has safely passed over hundreds of crossings that presented no greater appearance of safety.

To allow a verdict for damages to stand upon nothing more than appears in this record would be equivalent to dispensing with evidence and leaving the issue to the partial feelings, whims and prejudices of the jury. We know the disinclination of appellate courts to determine a question of fact contrary to the verdict of a jury, but when the jury have ignored the indisputable facts, the party prejudiced by their action has a right to have their verdict set aside. He has no other recourse than to appeal for relief against a verdict unwarranted by the evidence. The appellate court is not bound by any determination of fact which is clearly erroneous.

The plaintiff's second instruction submits to the jury the question of whether or not the planks were so arranged that the earth under them was "liable" to cave, etc. We object most earnestly to the use of the word "liable," as employed in this instruction. Any earth anywhere is liable to cave under certain circumstances in the ordinary use of pedestrians, as from undermining and disintegration caused by flowing water, etc. Moreover, the liability to cave, if considered at all, should have been such as resulted from its proper use.

The verdict of the jury was excessive. The plaintiff says

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Brief for appellee.

she had her arm broken and her ribs broken and was sick afterwards with hemorrhage of the bowels, had lost her strength, etc. We ask the court to note that she says that all signs of these broken bones had disappeared; that she went on to the depot and proceeded to Flora on the morning of the accident; that she did not go to bed after she got there; that she never received the attention of a physician, and that after a short stay in Flora she went down into the country some eight miles in a buggy, where she stayed for awhile, her subsequent movements being undisclosed, but doubtless evincing the same activity.

Alexander & Alexander and *H. B. Greaves,* for appellee.

The law of this case as announced in plaintiff's instructions is simple and elementary. Plaintiff's instructions as drawn are substantially copies of instructions already approved by this court in *Nesbitt* v. *Greenville,* 69 Miss., 22, and in the unreported cases of *Gibson* v. *City of Jackson* and of *City of Jackson* v. *Brown,* both decided within the last few years, in which the law of the cases announced in instructions similar to these were held so elementary that the cases were not even reported.

As to the general rules of law applicable, see also Elliott on Roads and Streets, pp. 447, 455, and as to the duty to anticipate defects and make reasonable inspection, *Ib.,* sec. 462; and on the point of notice to the road commissioner, or road overseer or person in charge of the work, or notice to the city, sections 463, 464. The fact that the sewerage work was necessary does not relieve the city of the obligation to keep the streets safe, and to protect pedestrians. *Ib.,* 365, 458. We call the court's attention to *Stainback* v. *Meridian,* 79 Miss., 447, where the principles of law announced in plaintiff's instructions were sustained and the judgment for plaintiff was reversed solely because the bridge was not fit for public use, and the plaintiff ignored the barricades erected by the city as warning.

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Brief for appellee.

As to the damage being excessive, we hardly think appellant's counsel will seriously press this point. It is hardly supposable that a jury in Jackson would give a nonresident excessive damages against their own city. Surely we would not expect to find any prejudice in a case like this. The evidence, however, shows that the verdict was very moderate. Mrs. Carver was sixty-three years of age, and for twenty-seven years had made her own living as a professional nurse. She was strong and well and had enjoyed perfect health all her life. She fell a distance of five feet, and was struck in the side by one of the planks, and as it afterwards developed, two of her ribs were broken, and as a result of this, or of the shock, internal hemorrhages set in and have continued ever since, thus bringing upon her a painful, alarming and loathsome disease. Her expectancy of life was ten or twelve years, and if we look only to the support which has been taken from her, the verdict would be sustained. But when we consider the pains she endured, the lingering illness which has been entailed upon her and her being dependent upon the charity of her friends and relatives, we surely think a court would be going far beyond all precedent and the rules of law in setting up its judgment in lieu of that of the jurors. They saw Mrs. Carver, they heard her testimony, and were in a better position to judge as to the extent of her injuries. Moreover, the circuit judge saw her and heard the testimony, and declined to disturb the finding of the jury.

It is true that Mrs. Carver did not for some weeks get any medical aid. She says she did not appreciate herself the extent of her injuries, and while she could not lie down but had to sit up all the time, she hoped to recover. The lady who kindly cared for her at Flora testified to the suffering that she had endured there, and the gentleman to whose home she went in the country testified to frequently hearing her groaning in the night, and being at last convinced of the alarming condition she was in, they sent for a physician, but owing to the unprece-

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dented rains they were unable to secure him. All of this testimony, however, was before the jury and the judge, and we have no fear that this court will find the slightest fact in evidence that will warrant them in saying that the jury and the court below were moved with passion and prejudice to the extent of giving an unwarranted verdict. A verdict for a much larger amount would have been sustained.

TRULY, J., delivered the opinion of the court.

This is a suit for damages for personal injuries said to have been incurred by reason of the negligence of the city of Jackson on account of a defective bridge — a crossing upon a public street of said city. The principles of law governing such cases in this state are plain, simple, and free from doubt. We quote, to approve and indorse, the language of this court in the case of *Nesbitt* v. *City of Greenville,* 69 Miss., 22, 10 South., 452, 30 Am. St. Rep., 521: "Ordinary care over its streets is the measure of diligence imposed upon municipal corporations, and they are not insurers against injury to persons using the public streets. We do not dissent from the elementary principle that, before the municipality can be held liable for injuries resulting from nuisances or defects in its streets, it must have knowledge of the nuisance or defect, and its danger. Notice there must be, to charge the municipality, but this notice may be actual or constructive or implied. Where the obstruction is created by the city itself, or where it permits an obstruction erected by another in its streets, it must take notice of such defects in the obstruction as ordinary care will discover. The structure in a street, to every part of which the public has the right of free access, must be erected in such manner and from such materials as to be reasonably safe, and it must be kept in this safe condition. Proper repairs, from time to time, are as much the duty of the city as a safe structure originally. Inseparably connected with this statement is another, viz.: that a municipality

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is liable for injury resulting from its defective structures, where by reasonable diligence it might have acquired knowledge of such defect. The common knowledge of mankind is chargeable to a municipality also. The knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities, just as to natural persons. The duty of the municipality to exercise ordinary care to detect such natural decay, and to guard against injuries therefrom, follows necessarily." And in the case of *Stainback* v. *City of Meridian,* 79 Miss., 447, 28 South., 947, 30 South., 607, on first appeal, it is announced: "It is actionable negligence for a city to remove a bridge over a ditch in a densely populated district, and provide and maintain, for the passage of pedestrians over the same, insecure planks, which careened when plaintiff, an infant, went upon them, causing her to fall and suffer injury, she being wholly without fault or knowledge of the insecurity of the plank passageway so provided for the use of herself and others by the city."

In the case at bar the foregoing propositions of law were correctly announced by the court in its instructions for plaintiff and defendant. In the light of the evidence in this case, we do not think that the instructions for plaintiff are open to the criticism of counsel for appellant. The facts, as developed upon the trial, show that on Sunday morning, December 23, 1900, the appellee, with two others, in the lawful and usual use of the streets, while on her way to the depot in the city, walking down the said walk in the manner usual for pedestrians, came to the bridge at which the injury is said to have occurred. One of her companions crossed in safety, but while the appellee was still on the crossing the other of her companions stepped on the plank, and their combined weight caused the plant to give way, and the bank of the ditch over which the plank was laid to cave, so that appellee was turned into the

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ditch, struck by one of the planks, and, as she avers, severely injured. It appears that the city of Jackson was engaged in installing a municipal sewerage system, and in the prosecution of this work it became necessary to dig trenches over all of the streets where the sewer pipes were to be placed. At night it was the custom, wherever one of these ditches or trenches crossed a public sidewalk, to erect a temporary bridge or crossing for the use of pedestrians. These temporary bridges were built by placing upon the ground three or four planks, side by side. At the particular bridge where the injury is said to have happened, this was the manner in which the crossing was built. It is in testimony that at this particular place the ground was not level, one bank of the trench being somewhat higher than the other. It is also in evidence that at this particular place the surface of the ground was covered with a layer of cinders, which, according to the testimony of some of the witnesses, rendered the bank more liable to cave. It seems that there was no effort made to fasten the planks in any way. They were simply placed upon the ground. No effort was made to dig a bed for the ends of the planks, or to level the opposite banks of the trench so that the planks might lie smoothly. There was considerable testimony as to the caving of the banks of these sewer trenches in various parts of the city, one witness testifying that at the place of the alleged accident the banks had caved until the trench was nearly or quite twice as wide as when built. It is further in testimony that at this particular crossing the planks only reached from six to eight inches on each side of the trench; that they could be moved without any trouble; that a citizen living near the crossing had complained of the dangerous condition of the crossing to the foreman of the crew working in that section of the city. These facts, or many of them, were controverted by witnesses for the appellant; but the issue of fact was fully presented to the jury, and by the jury decided adversely to the appellant. We are not prepared to say that

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the verdict is not supported by the testimony. True it is that the courts have said that notice must be shown to have reached the municipality, but in the case at bar there is not an absence of proof that direct complaint was made to the city, and it was for the jury to pass upon the credibility of this witness. But aside from the testimony of the actual notice to the city, was it not charged, under the law, as stated in the *Nesbitt Case, supra,* to use ordinary diligence in ascertaining for itself the condition of the crossing? It was said in the *Nesbitt Case* that "the knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities just as to natural persons." In this case is not knowledge of the action of elements on the banks of trenches to be attributed to the municipality? Is it not chargeable with the knowledge that continued rains will render the perpendicular banks of a trench liable to cave; that planks unfastened, lying loose upon the uneven surface of the ground, are liable to slip or give way under pedestrians who by the action of the city are invited to use such crossings? We think the same rule applies. It is in testimony here by the appellant's witnesses that many persons daily crossed at this place in safety. Under the rule in the *Stainback Case,* above cited, was it not negligence in the city to allow this condition to exist without using ordinary prudence in maintaining the safety of the crossing? We think the testimony fully warrants the verdict of the jury for the appellee.

The jury assessed damages in the sum of $4,000. The plaintiff was an old lady, sixty-three years of age, at the date of the injury. She had been making her living as a nurse. Her testimony, and all of the testimony for appellee, as to the extent and duration of her injuries, is vague and uncertain. From a careful consideration of this record, we are forced to the conclusion that the jury allowed a feeling of sympathy for an aged and dependent woman to lead them into awarding more than

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Statement of the case.

the strictly compensatory damages which the law warrants. From the facts before us, without intending to establish any precedent, but looking only to the facts of this particular case, we think the verdict was excessive.

Wherefore, if the appellee will enter a *remittitur* for $2,000, the judgment will be affirmed; otherwise reversed and remanded.

ANDREW S. WORK ET AL. *v.* WILLIAM C. WAGGONER ET AL.

GARNISHMENT. *Code* 1880, § 2422. *Judgment by default. Defective writ.*

A writ of garnishment, issued under Code 1880, § 2422, providing that a garnishee shall be summoned to answer in writing, which fails to notify the party garnisheed to make answer in writing, will not support a judgment by default against the garnishee.

FROM the circuit court of Leake county.

HON. SAMUEL H. KIRKLAND, Special Judge.

Work and others, appellants, partners, doing business under the name of "Work Bros. & Co.," were plaintiffs, and Waggoner and another, appellees, were defendants in the court below.

In December, 1890, appellants sued out an attachment against Gwin, and Waggoner and a Mrs. Joiner, appellees, were summoned as garnishees. The writ of garnishment was as follows: "Whereas it has been suggested to the undersigned clerk of the circuit court that William C. Waggoner [and others named] are indebted to said Gwin, or have effects of his in their hands, we therefore command you to summon the above-mentioned parties, if to be found in your county, personally to be and appear before the judge of our next circuit court to be holden for said county at the courthouse thereof on the 3d day

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Brief for appellants.

of March, 1890, then and there to answer on oath whether or not they are indebted to the said Gwin, or were so indebted at the time of the service of this garnishment," etc. The sheriff made the following return on the writ: "Executed by garnishing the within-named persons on list attached." Appellees did not appear, and judgment by default was entered against them. In March, 1898, appellants filed a declaration in the circuit court in debt on this judgment against Waggoner and others. Waggoner and Mrs. Joiner interposed a plea of *nul tiel* record, upon which the case was tried by agreement before the special judge without a jury. There was a judgment for defendants Waggoner and Mrs. Joiner, and plaintiffs appealed to the supreme court.

[It will be observed that Code 1892, sec. 2131, of which Code 1880, sec. 2422, is the prototype, omits the requirement that the writ of garnishment shall specify that the answer shall be in writing.]

Luckett & Ellis, for appellants.

The issue presented and upon which the lower court went off, was that the writ of garnishment issued in this case on the 27th day of December, 1890, was void and of no force and effect, because the little word "writing" was omitted from it by the clerk, and the special judge grounded his opinion upon the case of *Acme Lumber Co.* v. *Vandergrift Shoe Co.,* 70 Miss., 91.

In this case the appellees are making a collateral attack on the judgments rendered against them by the circuit court, and in such case the burden is on them to show that plaintiffs' judgment is absolutely void.

The only attack that appellees make on the judgment is that the writ of garnishment omitted the word "writing," and hence it was void on that account. While it would have been more regular for the writ to have had that little word in it, yet we think the failure would not render the writ absolutely void and

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Suggestion of error for appellants.

the judgment rendered thereon, so as to lay the judgment open to a collateral attack by the judgment debtor and garnishee, nor do we think the case of *Acme Lumber Co.* v. *Vandergrift Shoe Co.,* 70 Miss., 91, so decides. The court, in rendering the opinion in that case nowhere says the judgment was void, but only that it was insufficient, meaning thereby that on a direct appeal the judgment would be reversed on account of such failure, but bear in mind that in that case the writ was faulty for other reasons. *Callen* v. *Ellizon,* 13 Ohio St. R., 446.

J. B. Sullivan, for appellees.

The court said in the case of the *Acme Lumber Co.* v. *Vandergrift Shoe Co.,* 70 Miss., 91: "We have italicised those portions of section 2442 of the code which are absent from the writ of garnishment. It is manifest that they are material."

That case is a full and complete settlement of the one at bar as it raises the very same points that are involved in this case.

CALHOON, J., delivered the opinion of the court.

These proceedings are controlled by the Revised Code of 1880. The action of the sheriff was on the writ of garnishment issued December 31, 1890, which writ was defective, in that it did not require the answer to be in writing. That defective writ was the one under which the sheriff acted, and therefore his return could not sustain a judgment by default, under the case of *Acme Lumber Co.* v. *Vandergrift Shoe Co.,* 70 Miss., 91, 11 South., 657.

Affirmed.

Alexander & Alexander, for appellants, after the delivery of the foregoing opinion, filed a suggestion of error, making the following points: The error is the failure to observe that the judgment against Mrs. Joiner, garnishee, was rendered not on the garnishment writ and the service of the officer thereon, but was rendered on the garnishment by the clerk acting under the

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Suggestion of error for appellants.

attachment writ, pursuant to sections 2424 and 2442 of the Code of 1880. Mrs. Joiner was not summoned as garnishee pursuant to the writ of garnishment, but summoned by the sheriff as one found indebted upon the books of the defendant in attachment. The affidavit in attachment suggests certain persons to be garnisheed, but Mrs. Jointer is not among these. The first mention of Mrs. Joiner in these proceedings is in the return of the sheriff on the attachment writ. This return recites, in the language of section 2424 of the Code of 1880, that the sheriff summoned these persons because they appeared to be indebted to the defendant on said books. This writ of attachment was issued on May 27th. Plaintiff secured a regular writ of garnishment for the persons who had been named in the affidavit for attachment. Mrs. Joiner's name is in neither the suggestion nor the writ of garnishment. It will be observed that the sheriff executed the writ of attachment by seizing the account books of defendant, and on the next day he executed both the writ of attachment and the garnishment; at least he made a return on it that he executed "this attachment and garnishment." Now, the writ of attachment for certain designated persons can only be served on these persons; hence the sheriff could not have served Mrs. Joiner under the garnishment writ, since she was not named under it. It is clear that he was acting under only the attachment writ, since he noted the seizure of the books under the writ, and recited that he summoned Mrs. Joiner as one found indebted upon the books. The judgment does not contradict this claim in any way, but merely recites that certain persons, among others Mrs. Joiner, had been legally and duly summoned as garnishees. The defense made by Mrs. Joiner amounts to a plea of *nul tiel* record, the point presented being merely the want of sufficient service on her as garnishee. It can hardly be questioned that under the Code of 1880 a general return of the summoning as garnishee is sufficient under the attachment writ. This is not only the plain

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provision of the statute, but is either expressly declared or taken for granted in all cases coming under the Code of 1880 involving the question of sufficiency of services on the garnishee. *Faison* v. *Wolfe,* 63 Miss., 24. There is considerable confusion as to just how Waggoner was served. His name was suggested in the affidavit for attachment, and he was mentioned also in the subsequent garnishment writ. The sheriff executed the attachment writ and the garnishment by levying upon the books of account and summoning certain named persons who appeared to be indebted to defendant on said books, and among these persons is Waggoner. The language of the return and reference to the books shows that the sheriff proceeded under sections 2424 and 2442, Code 1880. For these reasons we think service on Waggoner is also sufficient.

CALHOON, J., delivered the opinion of the court in response to the suggestion of error.

The grounds taken in the suggestion of error are the same as those taken in the original brief, and the arguments are very forcibly presented in both, and were carefully considered in the first instance. The opinion, out of a wish, perhaps too strong, by the writer of it, to condense, was, perhaps, obscure from lack of fullness, and it may be due counsel to make it more explicit. Short as it was, however, it did show twice our finding from the record that the sheriff's action was on the writ of garnishment of date December 31, 1890. That writ being void under the case of the *Acme Lumber Co.* v. *Vandergrift Shoe Co.,* 70 Miss., 91, 11 South., 657, the sheriff's return of it was void, and with all the more reason void as to Mrs. Joiner, because her name does not appear among the large number suggested by the plaintiff in attachment for garnishment. We must decide causes from records as presented, and certainly will indulge no presumptions to hold a garnishee on a judgment by default seven years, less three days, after, under legislation

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which then set a snare for the unwary, which required less formality in the service and return of process on a garnishee than on the debtor sued, and by which the rights of citizens, with no interest in the controversy, and no paper handed them, might be tossed overboard with as little ceremony as corpses of plague patients at sea. Such laws must be enforced, as all laws must, but they certainly have no claim to a more liberal construction than others. This record shows that the affidavit for attachment was made December 18, 1890. Following it appears a suggestion of twenty-one names for garnishment, of which names appears that of Waggoner, but not that of Mrs. Joiner. On that same day, December 18, 1890, was issued a plain writ of attachment against J. Gwin, the defendant in the action, without suggestion of garnishees, or any command to garnish. The return on this shows that it was executed on December 30, 1890, "by attaching J. Gwin's account book." On December 31, 1890, the only writ of garnishment in the record—and it specified the same twenty-one people mentioned in the suggestion, including Waggoner, but excluding Mrs. Joiner—was issued. On that same day—December 31st—appears a loose paper, not appearing to be attached to or indorsed on either the writ of attachment or the writ of garnishment, and without even the style of the case appearing, which reads thus: "Executed this attachment and garnishment this day by levying upon and taking into my possession the books of account of J. Gwin, the defendant, and by summoning the following named persons who appeared to be indebted to defendant on said books as garnishees, to wit." The numerous names included both Waggoner and Mrs. Joiner. Now, the garnishment writ was void, and we are asked to assume on this state of the record that the garnishees were summoned only under attachment writ, and not under the garnishment writ. We decline to do so. The officer's return in effect shows that he executed "this" writ of attachment by levying on the books, and "this"—the only—writ

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Brief for appellant.

of garnishment "by summoning," etc. It seems plain that he acted on the void writ of garnishment.

Suggestion of error overruled.

HARVEL RAY *v.* ISAAC M. KELLY.

INFANCY. *Emancipation.* *Code* 1892, §§ 493-497. *Code* 1892, § 1508. *Trust estate.*

The emancipation of a minor, under Code 1892, §§ 493-497, authorizing the chancery court to remove the disability of infancy in certain cases, does not empower him to demand a conveyance of a trustee who holds land by a deed directing a conveyance to him when he becomes of age, since under Code 1892, § 1508 (declaratory of the common law), a minor is any person under twenty-one years of age.

FROM the chancery court of Madison county.

HON. ROBERT B. MAYES, Chancellor.

Ray, appellant, was complainant, and Kelly, appellee, was defendant in the court below. From a decree in defendant's favor, the complainant appealed to the supreme court. The facts are fully stated in the opinion of the court.

W. H. Powell & Huber, for appellant.

The deed was made and the expressions therein were used with reference to and with a knowledge of the power of the court to remove Ray's civil disabilities of minority and make him of age so far as all of his property rights and powers were concerned, and it is with property rights, not political or moral, that we are to deal.

No arbitrary meaning can attach to the words "minority" or "of age" but the words should be generally and liberally construed, not technically.

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Brief for appellant.

Harvel Ray has jumped his "minority" and is now "of age," and is entitled to a settlement with Kelly, and should receive a conveyance of the legal title to his property. We give the definitions of the terms. Age is defined by Bouview (Law Dictionary) as "that period of life at which the law allows persons to do acts or discharge functions which, for want of years, they were prohibited from doing or undertaking before."

Kinney, in his law dictionary, adds to this, "the period is variedly fixed by statute in different jurisdictions." This makes it evident that the words "of age" must be construed in its most general sense and cannot be limited to twenty-one years any more than it can to eighteen or twenty-five years.

The Century Dictionary defines as follows: "Age—a period of existence, an age, a life time."

See also paragraph three, and also more especially, "of age," "full age;" full age or lawful age, designates the attainment of majority, or that period when the general disabilities of infancy cease."

Such disabilities cease as surely by decree of court as by the lapse of years. Again, the same authority defines minority, "the state of being a minor or not come of age, and therefore legally incapaciated for the performance of certain acts."

We say that the incapacity is removed by law (the decree of the court) just as effectually as the incapacity was created (by the general laws of the state making twenty-one years the age of majority). The Standard Dictionary defines it as follows: "Minority, law—the state of being a minor, legal infancy." The decree has destroyed the legal state of infancy.

It may be argued that one whose civil disabilities of minority have been removed cannot vote. That is true, but it is because the constitution and statute says that one cannot vote until he becomes twenty-one years of age. Constitution, sec. 241; Code, sec. 3631. The law does not say that a minor cannot vote, but that one who is under twenty-one years of age can-

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Brief for appellee.

not vote. This is an arbitrary fixing of the age at twenty-one years.

If Mary Ann Ray had intended by her deed that the legal title to the property should rest with the trustees until her son became twenty-one years of age, she would have so stipulated in the bond, and her will would have become the law and left no room for construction, just as the constitution has fixed the age at twenty-one years when one can become a qualified elector.

Twenty-one years is definite and conclusive, but "of age," "minority," and "majority" are not conclusive.

The most reasonable view to take is that Mrs. Ray made a deed with a knowledge of the law, that her son's civil disabilities could be removed by the court, and that her intention was for him to have the property whenever he was deemed qualified by the law to manage it.

Barnett & Perrin, for appellee.

Under the common law and the Code of 1892, sections 1505, 1508, a person is a minor or an infant in law until the age of twenty-one is reached.

After the removal of the disabilities of a minor, there are many things he cannot do, such as voting, holding office, etc. The code does not authorize the court to make a minor of age, but authorizes it to remove the disabilities of minority in whole or in part. Section 497, in directing what kind of a decree shall be rendered says, ... "and the decree made shall distinctly specify to what extent the disabilities of the minor is removed and what character of acts he is empowered to perform notwithstanding his minority.

What was the intention of the creator of the trust? It is a fundamental rule of interpretation that words are to be given their plain, ordinary, and popular meaning. What is the plain, ordinary, and popular meaning of the phrase "becomes of age" and "during minority" in those jurisdictions where the com-

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Brief for appellee.

mon law rule as to majority is in force? We think there is no room for doubt that in each instance the age of twenty-one is referred to. But it will be contended that as every person is presumed to know the law, that the creator of the trust thus knowing of the power of the court to remove disabilities of minority, advisedly omitted the use of the word twenty-one and substituted other words. The maxim that ignorance of the law excuses no one, and the expression that every one is presumed to know the law are equivalents, but both are based on public policy, and neither is a rule for the construction of instruments or the interpretation of words. But if they were, appellant can derive no benefit from them, the language of the instrument is, when the minor "becomes" of age, not when he is made of age. Assuming that the creator of the trust knew the law, then the word "becomes" was used advisedly, and the omission of the additional words "or made of age," shows that the efflux of time and not a decree of the court was contemplated.

As a matter of illustration, suppose that this instrument gave an estate to the appellant to be divested after he became of age, or after his minority had ceased, would the removal of the disabilities of appellant divest his estate?

So far as appellee is concerned the most important thing for him to know and for this court to decide is whether the removal of the disabilities of appellant had destroyed the contingent interest of B. J. Barrier in the property conveyed by the instrument creating the trust. It will be observed that this instrument provides that in the event of the death of appellant during minority, etc., the property is to go to B. J. Barrier, and, in such event, the trustee is to convey the property to B. J. Barrier. The words "becomes of age" and "during minority" are evidently used in the same sense, and the same meaning is to be attached to both. There can, we think, be no question that the creator of the trust in thus providing for B. J. Barrier, had in mind not only a fixed time, but fixed the time herself, not con-

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Opinion of the court.

templating any changes in the status of appellant to be made by the court in the removal of disabilities of minority.

We call the court's attention to the provisions in the instrument providing for the maintenance and education of the appellant, contemplating, as we submit, that the trustee shall provide for the appellant's education and maintenance until he became twenty-one years of age. Certainly the instrument does not contemplate that such maintenance and education in the manner provided for in the instrument creating the trust should cease when the court saw fit to remove the disabilities of minority.

TRULY, J., delivered the opinion of the court.

On the 4th of June, 1890, Mary Ann Ray executed a trust deed conveying to I. M. Kelly real estate and personal property therein described, with full power to take charge of, control, manage, and direct as he might see proper, in the interest of her minor son, Harvel Ray, until he, the said Harvel Ray, shall become of age, "when the said property herein conveyed and still remaining in the hands of said trustee, shall be delivered to him, and said trustee is hereby directed to make a deed in fee simple to said lands, to said Harvel Ray, who shall thereafter hold the same absolutely," with this further provision: "Should said minor die during his minority without a wife living or issue of the body or descendants of the same, the property herein conveyed shall go to his half-brother, B. J. Barrier, or his children or descendants of the same, should he have any." The said trustee is given full power to lease or sell said property, and provide for the maintenance and education of said minor, Harvel Ray. The said Harvel Ray was eighteen years of age, as shown by this record, on June 12, 1903. On the 1st day of July, 1903, his civil disabilities of minority were removed by the chancellor in vacation. The following is the language of the order: "The civil disabilities of minority of Harvel Ray

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be and they are hereby removed generally, and he is authorized to do and perform all acts in reference to his property or otherwise, and make a will, and be sued and to sue, as he could if he was of full age of twenty-one years." On the 10th day of September, 1903, the said Harvel Ray filed his bill of complaint in the chancery court of Madison county, making I. M. Kelly, trustee, sole defendant thereto; praying that the said I. M. Kelly be ordered by court to file a final account of trusteeship, and to deliver up all money in his hands due him, and to convey to him all other property that Harvel Ray owns. To this bill of complaint defendant demurred, and, amongst other grounds of demurrer, sets up that the trust created was a continuing one, and that defendant's position as trustee or guardian does not terminate until the said Harvel Ray arrives at the age of twenty-one years; also that the said B. J. Barrier was a necessary party to the bill of complaint, and had not been joined therein.

We find no merit in the contention of appellant that the emancipation of the minor terminates his minority. The terms of the trust is the law of the trust. It was the evident intention of Mrs. Mary Ann Ray that the trustee should remain in full possession and control of the financial affairs of the minor until he arrived at the age of twenty-one years. Parties must be considered to mean what their words imply in the usual acceptation thereof. Section 1508, Code 1892, defines the term "minor" to mean "any person under twenty-one years of age," and this is the law. The removal of the disabilities of minority only authorizes the making of contracts in reference to the management of the property that the emancipated minor is lawfully the owner of. In this case Harvel Ray will not be the owner of the property described in the Kelly trust deed until he becomes twenty-one years of age. If the trustee had been ordered to make a deed in fee simple to the lands in question to the said Harvel Ray, and thereafter Harvel Ray had died dur-

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Statement of the case.

ing his minority, unmarried and without issue, could it be contended that the rights of B. J. Barrier would not be prejudiced thereby?

We think the judgment of the chancellor correct, and it is therefore affirmed.

MERCHANTS & FARMERS BANK v. JOSEPHINE CALMES.

1. PLEADINGS. *Special plea. General issue. Demurrer.*

A special plea is not demurrable because it amounts to the general issue.

2. GUARANTY. *Not continuing.*

A guaranty of all amounts that may be due from the original debtor, within a designated sum, is not a continuing one.

FROM the circuit court of Noxubee county.

HON. GUION Q. HALL, Judge.

The Merchants & Farmers Bank, appellant, was plaintiff, and Mrs. Calmes, appellee, was defendant, in the court below.

The suit was upon a written contract of guaranty in these words: "Brooksville, Miss., December 6, 1898. We hereby guaranty the account of Calmes & St. John Co., with the Merchants & Farmers Bank of Macon, Miss., to the amount of $2,500. It is agreed and understood that this guaranty is to cover all amounts which above firm may owe the said bank to the above specified amount. (Signed) W. P. Calmes, Josephine Calmes."

Defendant filed several pleas. The plaintiff demurred to one of them because, as was contended, it amounted only to the general issue. The other pleadings were all resolvable into the question whether the guaranty sued upon was or was not a

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Brief for appellant.

continuing one. The court below decided for defendant, and the plaintiff appealed to the supreme court.

J. E. Rives, for appellant.

"A special plea which amounts only to the general issue is bad." *Alexander* v. *Eastland,* 37 Miss., 554; *Wallace* v. *Seales.* 36 Miss., 53; *Moore* v. *Michiel,* Walker (Miss.), 231; *Bingham* v. *Sessions,* 6 Smed. & M. (Miss.), 13; *Anderson* v. *Patrick,* 7 How (Miss.), 347.

Where a guaranty is intended to cover several credits or transactions, and not one single indebtedness, such a guaranty is a continuing guaranty. Brandt on Suretyship, Sec. 130; *Boehne* v. *Murphey,* 2 Am. Rep., 485.

A wife assigned certificate of stock to the creditor of her insolvent husband for security for payments of any demands the creditor may from time to time hold against him. This was adjudged a continuing guaranty. *Merchants' National Bank of Whitehall* v. *Hall,* 38 Am. Rep., 434.

This honorable court held that the following was a general letter of credit, with the same force and effect of a continuing guaranty:

"Dear Madam: Your favor of the 19th inst., just received. You are authorized to draw on N. G. Nye for the sum of $300 placed with Judge Nye for your account by M. W. Richardson. Any amount you may wish to draw on N. G. Nye we will pay the money here with usual exchange.

"Very respectfully, THOS. E. HELM."

"To Mrs. Willie G. Wills."

See *Pollock* v. *Helm,* 54 Miss., 1.

In Brandt on Suretyship and Guaranty, where the author gives instances of the courts holding guarantys to be not continuing ones not a single case is applicable to the case at bar, but on the other hand among the instances referred to by Mr. Brandt, in which guarantys are held by the court to be continuing ones.

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Brief for appellee.

there are several cases that are on all-fours with the case at bar. Brandt on Suretyship and Guaranty, section 130 to 134, inclusive; *White's Bank* v. *Miles,* 29 Am. Rep., 157; *Taussey* v. *Reid,* 36 Am. Rep., 504; *Bank* v. *Tolbert,* 50 Am. St. Rep., 385, and note on p. 388; 14 Am. & Eng. Enc. Law, 1139 and note.

S. A. Witherspoon, for appellee.

If it be true, as claimed in the demurrer, that the seventh plea amounts to the general issue, this would not be a good ground of demurrer, as was expressly held in *Polkinghorne* v. *Hendricks,* 61 Miss., 366.

That the guaranty sued on was intended to secure only the then existing indebtedness to the amount of $2,500, and that it had no reference to the contraction of future debts is apparent from the words of the guaranty itself.

The verb guaranty is in the present and not in the future tense showing that the writer of the guaranty was thinking of the present and not of the future. The word account, as used in the first sentence of the guaranty, must have had reference to the then existing indebtedness, because there was then no future account to which it could apply. If the writer of the guaranty in using the word account had been considering some account to be created thereafter, it is certain that he would have qualified the word account by some expression which would have properly described an account not then existing, but to be thereafter created.

In the second sentence of the guaranty we have four verbs all in the present tense and not one in the future tense.

If the guaranty sued on be construed to relate entirely to the present and not embrace future transactions, it would necessarily be a limited and not a continuing guaranty, but even if it be construed to refer to the future as well as the present, it does not necessarily follow that it is a continuing guaranty.

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Opinion of the court.

This is illustrated by many cases in the books. *Fellows* v. *Prentiss,* 45 Am. Dec., 484; *Gard* v. *Stevens,* 86 Am. Dec., 53; *Columbus Sewer Pipe Co.* v. *Gonser,* 55 Am. Rep., 697, 58 Mich., 385, 8 John., 119, 54 Pac., 1062; *White* v. *Reed;* 15 Conn., 457, 2 Am. Rep., 486; *M. N. B.* v. *Hall,* 38 Am. Rep., 440; *Twohy* v. *McMurran,* 59 N. W., 301, 54 N. E., 344; *Cutler* v. *Ballou,* 186 Mass., 337.

The bill of particulars filed with the amended declaration shows that the account exceeded $2,500 at the close of business on the 6th day of December, 1898, and that thereafter payments were made and credited on the account to the entire amount of $20,000. This payment had the effect of satisfying the entire indebtedness due on the 6th day of December, 1898, and thereby discharged the guarantor from all further liability.

CALHOON, J., delivered the opinion of the court.

We think there was no error in overruling the demurrer to the seventh plea. It is more than a plea of the general issue, and, if it were not more, it is not for that reason demurrable. *Polkinghorne* v. *Hendricks,* 61 Miss., 366. We think the guaranty was not a continuing one, and was confined to the account as of its date, December 6, 1898. This goes to the root of the case. The demurrer to the replication to the ninth plea was properly sustained.

Affirmed.

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Statement of the case.

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ROXANA KENOYE, GUARDIAN OF ANNA C. HARDISON, v. DORA BROWN ET AL.

TENANTS IN COMMON. *Conveyance by one. Specific part. Rights of Cotenants. Effect of Deed. Estoppel.*

A deed from one tenant in common to a specific part of a general tract of land owned by several:

(a) Is inoperative to impair any of the rights of the grantor's cotenants;

(b) But, if the part so conveyed be allotted upon partition to the grantor in the deed, the grantee will take the same by estoppel; he will not, however, be invested with an interest in any part of the general tract not conveyed by the deed.

FROM the chancery court of Washington county.

HON. CAREY C. MOODY, Chancellor.

Dora Brown and another, appellees, were complainants in the court below; Anna C. Hardison who, defended by her guardian, Roxanna Kenoye, was defendant there.

In May, 1886, William Brown died intestate, leaving his wife, Mary Brown, and their two children, Dora and Willie Brown, as his only heirs. At the time of his death he owned the west half of lot 2, block 20, of the third addition to the city of Greenville. In September, 1887, Mary Brown, the widow, sold the south half of this lot to one Williams, and it came by successive conveyances to Anna C. Hardison, the defendant in this case. In February, 1900, Dora and Willie Brown filed the bill in this case against Anna C. Hardison in the chancery court of Washington county, setting up that her claim was a cloud upon their title to a two-thirds interest in the south half of the west half of said lot, and that they were the real owners of said two-thirds interest, and prayed to have the cloud removed, and for the sale of the land for partition, and for an

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Brief for appellant.

accounting of the rents and profits of the lot. Defendant answered by her guardian, Roxana Kenoye. There was a final decree for complainants, cancelling defendant's claim as a cloud on their title, ordering the land sold for partition, and directing an accounting. From that decree, defendant appealed to the supreme court.

E. N. Thomas and *A. J. Rose,* for appellant.

The effect of the conveyance to Williams was to give him just such interest as Mary had in the west half. We invoke the rule of law as laid down in 17 Am. & Eng. Enc. Law (2d ed.), 683. While one tenant cannot convey a specific part of the common property by meets and bounds to the prejudice of his co-tenants, as against the grantor and those claiming under him such conveyance will be sustained upon the principles of estoppel, and if upon a subsequent partition of the property the part conveyed falls to the grantor so that the rights of his cotenants are not prejudiced by the conveyances the grantee takes a good title. In any case the grantee as against the grantor acquires title to the land conveyed subject to the contingency of loss thereof in case on partition that part of the common estate should not be allotted to his grantor. This is the principle for which we contend. We contend that the lot inherited from William Brown should be partitioned just as if no conveyonce had been made by Mary. If Mary had not conveyed the south half, but instead thereof had put the improvements on the common property that were placed thereon by Williams, on partition between her and her children, she would unquestionably be entitled to contribution for these improvements. 3 Am. & Eng. Enc. Law (2d ed.), 186; Pomeroy's Equity Jurisprudence, 1389.

Now the fact that she did convey the south half, believing that she could convey and intending to convey her interest in the whole property, does not effect the equities

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Brief for appellant.

nor enlarge the interest of her cotenants. She could not of her own volition make a partition of the property or sever her interest from the others, but she could do anything with her interest that was not prejudicial to the interests of her cotenants. If she attempted to convey more than she owned, such conveyance would not operate against her cotenants, but on partition her vendee would take such interest as she had in the common property. In *Bartlett* v. *Hawlor,* 12 Mass., 347, s. c., 7 Am. Dec., 76, the court held that while tenants in common cannot convey by deed by meets and bounds a specific part of the common property so as to entitle the vendee to maintain a writ of partition, but the purchaser, when the partition was made between the cotenants, would be entitled to the portion set apart to his vendor. The vendor would be estopped from asserting his right to this part. Cited and approved, 17 Mass., 285; 21 Pick., 284; 24 Pick., 332; 1 Met., 257; 7 Cush., 369; 12 Cush., 398; 12 Allen., 366; 12 Mass., 474. In approving *Bartlett* v. *Hawlor,* the court held on the fullest consideration that such conveyance by way of estoppel carries the interest of the grantor, and those claiming under him to the common property. That the rule of law which inhibits one joint tenant from conveying any specific part of the land to a stranger to the prejudice of his cotenants is not violated. This doctrine is further sustained in *Howze* v. *Dew,* 90 Ala., 178.

The weight of authority and the better reason support the proposition that such conveyance should be accorded full force and effect as against any interest the grantor has, or subsequently acquires in the land. See also Freeman on Cotenancy, sec. 199, *et seq.*; *White* v. *Sayre,* 2 Ohio, 112; *Robinette* v. *Preston,* 2 Rob. (Va.), 278; *Gates* v. *Solomon,* 35 Cal., 588; *Clark* v. *Barrett,* 15 Cal., 370; *Barnhurst* v. *Campbell,* 50 Mo., 599.

Mary Brown was a necessary party, and this case could not

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Brief for appellees.

proceed without her. How could the court ascertain what Mary's interest was and thereby fully protect the infant defendant, without making Mary a party? If the doctrine announced by the Massachusetts court is correct, no partition could be made without making her a party. Mary Brown was certainly a necessary party, and the relief sought by the crossbill could not be decreed without making her a party. 5 Enc. Pl. & Pr., 648, and cases there cited.

If Mary Brown was a necessary party, suit could not be proceeded with until she became a party. 52 Miss., 353.

We call the court's attention especially to the case of *Young* v. *Edwards et al.* (S. C.), 10 L. R. A., 55.

J. H. Wynn, for appellees.

The principle announced in *Young* v. *Edwards,* 10 L. R. A., 55, and *Paddock* v. *Shields,* 57 Miss., 340, and cases of like import, that upon a sale of a part of the common property by metes and bounds by one cotenant, such part will, upon partition, be set aside to the purchaser if it is not in excess of the interest of the vendor in the whole land, and if not prejudicial to the interest of the other cotenants, has no application in this case, for the part which Mary Brown sold and which came to the appellant — that is, the south half of the land, at the time of the sale, was equal in value to the unsold part, and at the time of the filing of the bill was equal in value and exceeds both in area and value one-third of the whole west half of the lot. For the northwest quarter and the southwest quarter are of equal size, each having fifty feet front, and each having a house thereon, so that the property could not be divided so as to set aside one-third of the lot as contended for by the appellee, and the court so found. The purchaser by metes and bounds of a common property from a cotenant does not become a cotenant with the other cotenants in common of the whole property, notwithstanding the finding of the referee in *Young* v. *Edwards, supra,* but he simply becomes a tenant in common with them of

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the part purchased with an equitable right to have that part assigned to him upon partition if it is not in excess of the vendor's interest in the whole property in area and value, and is not prejudicial to the rights of the other cotenants. The courts of many of the states hold that a sale by metes and bounds of a part of a tract by one cotenant is absolutely void, and that the other cotenant may disregard it altogether. But in this state such sale is not void, but makes the purchaser a cotenant to be protected in the part purchased upon partition if it is not prejudicial to the interest of the other cotenants, and not in excess of the interest of the vendor in the whole tract, is as far as the courts go, and is the only right to which the purchaser is entitled.

WHITFIELD, C. J., delivered the opinion of the court.

The true principle to be deduced from the authorities is that, where one tenant in common makes a conveyance by specific metes and bounds of a part of the common estate, such deed is voidable in so far forth as it operates to the prejudice of his cotenants, at their election, but will convey the interest of the grantor in the parcels specifically conveyed, as against the grantor, and if, in the subsequent partition, the particular tract thus conveyed by metes and bounds should be assigned to the cotenant conveying, the title will inure, by virtue of the doctrine of estoppel, to his grantee. The limitation is always strictly observed, that such deed shall not be permitted to operate to the prejudice of the cotenants of the grantor. There is one authority cited —*Young* v. *Edwards* (S. C.), 11 S. E., 1066, 10 L. R. A., 55, 26 Am. St. Rep., 689 — which holds that in such case the deed shall operate to convey to the grantee not simply the interest of the grantor in the lands specifically conveyed by metes and bounds, but the entire interest of the grantor in the whole tract, provided, however, the land so conveyed by metes and bounds does not exceed, either in area or

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value, the aliquot share of the grantor in the whole tract; and it is this last qualification which makes this authority, if sound, inapplicable in this case, since in this case the tract conveyed by metes and bounds largely exceeded, both in area and value, Mary Brown's aliquot share in the whole tract. But the Mississippi doctrine is as first stated, and as set out in *Richardson* v. *Miller,* 48 Miss., 335, 336, to wit: that in such cases all that the grantee gets in any case is the interest of the grantor in the part conveyed by metes and bounds. We understand Mr. Freeman to approve this doctrine, from various expressions cited below. As, for example, he says in section 205: "But in no case can the conveyance of one tenant in common, or of any less than all the cotenants, give the grantee any greater rights than those held by the grantor or grantors." And in section 204 he says: "If, however, there remain any states wherein the courts really intend to assert that a conveyance by one cotenant of part of the common property is void, in any other sense than that such conveyance will not operate to diminish or impair the rights of the nonassenting cotenants, such courts are falling into the minority, as the more recent decisions tend strongly and surely toward the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantee to certain rights that the cotenants of the grantor cannot wantonly disregard." Note the expression, "Valid transfer of all the grantor's interest in the property therein described"— that is to say, in the deed, not in the whole tract. In the case of *Gates* v. *Salmon,* 35 Cal., 576, 95 Am. Dec., 139, cited by Mr. Freeman, on page 203, in his work on Cotenancy and Partition, the court says: "The rights thus assigned to the grantee are precisely those pertaining to the grantor in the special tract — no greater and no less. The grantor, before his conveyance of the special tract, held his undivided interest therein subject to the contingency of the loss of it, if on partition of the general tract the special tract should

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be allotted to one of his cotenants. The grantee then acquires all the interest of his grantor in the special tract, and that interest is a tenancy in the special tract in common with the cotenants of his grantor; but his conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, and the general tract is therefore liable to a partition, so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made." 17 Enc. Law (2d ed.), p. 684, states the rule thus: "The true doctrine, as deduced from actual decisions, seems to be that such conveyances are absolutely void as against cotenants whose rights are prejudiced thereby, and who have not consented to them or ratified them, but that, when confirmed or assented to by the other cotenants, such conveyances are valid as against all parties. The assent of the cotenant in such case need not necessarily be by deed, but may be inferred from long acquiescence in the grantee's title. In any case it seems that a tenant cannot complain of a conveyance of a specific part of the common estate by a cotenant where his own rights are not injuriously affected thereby. And a court of equity will respect the rights of the grantee, so far as this can be done consistently with the rights of the cotenants, and, wherever practicable, will confirm the title of the grantee by allotting to his grantor that portion of the land conveyed." In the case of *Stark* v. *Barrett*, 15 Cal., 368, Field, C. J., afterwards associate justice of the United States supreme court, says: "This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract owned by several is inoperative to impair any of the rigths of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract, as, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible

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result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contingency of the loss of the premises, if upon the partition of the general tract they should not be allotted to the grantor. Subject to this contingency, the conveyance is valid, and passes the interest of the grantor." If the "grantee takes subject to the contingency of the loss of the premises, if upon partition of the general tract they should not be allotted to the grantor," manifestly the grantee only gets the grantor's undivided interest in the part embraced in the deed, and not his undivided interest in the whole of the original tract. The grantee in such case must look to his grantor on the warranty in his deed. The precise point is decided in accordance with the rule in *Richardson* v. *Miller, supra;* in *Dennison* v. *Foster et al.,* 9 Ohio, 126, 34 Am. Dec., 429, where the court say: "The effect of such deed is to pass to the purchaser the grantor's proportional interest in the part described in the deed. Tenants making such separation of interests and their heirs are bound by it, especially if the deed contains covenants of warranty." And again, the point is decided in *Soutter* v. *Porter,* 27 Me., 405, where the court say: "Such a conveyance of a tenant in common, however, cannot, in any event, operate contrary to the expressed declarations and intention of the parties, to convey an estate in common instead of an estate in severalty." This is undoubtedly sound. The grantor meant to convey an estate specifically marked out, by metes and bounds, in severalty. All that the grantor may get out of that particular estate on subsequent partition inures to his grantee, properly enough, under the estoppel arising out of the deed. But to hold that the grantee, when he loses the particular tract, will get his grantor's undivided interest in the whole of the original tract, would be to extend the estoppel beyond the deed, and give an undivided

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Opinion of the court.

interest in the common estate, instead of what was granted — an estate in severalty. And so in *Dorn* v. *Dunham,* 24 Tex., 366, the court say: "If, under such an agreement, the obligor were unable to make title by reason of the land falling to the share of another in the partition between the cotenants, the remedy of the obligee would be by suit for damages for the breach of the contract." These authorities certainly make it clear that the rule of *Richardson* v. *Miller* is the sound rule. The expression in that opinion that such a deed is void (quoted from Kent) must be understood to mean that it is voidable at the election of cotenants who will be prejudiced thereby. Mr. Freeman is entirely right in saying such deeds should not be spoken of as absolutely void, but as voidable at the election of cotenants whose rights are prejudiced thereby. In the case of *Kimball* v. *Street Railway Co.,* 173 Mass., 152, 53 N. E., 274, decided March, 1899, Holmes, J., now associate justice of the supreme court of the United States, says that, whilst there have been expressions to the effect that such a deed is void, it "seemed to that court hardly to need argument that such a deed, accompanied by possession, was only voidable." We quote but one other authority — the opinion of Bell, J., in *Whitton* v. *Whitton,* 38 N. H., 127, 75 Am. Dec., at page 167: "He has an interest in the question whether the property shall be divided, and, if so, in what manner, precisely so much greater than an ordinary tenant in common, as he is liable to have his entire interest assigned to another in the partition, and his whole estate defeated, without redress or compensation." We refer especially, in conclusion, to the case of *Worthington* v. *Staunton,* 16 W. Va., 208, as containing the best exposition of this whole subject we have seen anywhere. See also, *Emeric* v. *Alvarado,* 90 Cal., 456, 27 Pac., 356.

Affirmed.

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Statement of the case.

GULF & SHIP ISLAND RAILROAD COMPANY v. CHARLES M. BUSSEY ET AL.

1. RAILROAD. *Fellow servant. Constitution* 1890, *Sec.* 193. *Code* 1892, § 3559.

Constitution 1890, § 193, touching the application of the fellow-servant rule in the case of railroad employes, has no application to an action based on the negligence of the railroad company itself, in failing to provide a safe road bed.

2. SAME. *Contributory negligence.*

Facts considered, and the defense of contributory negligence adjudged not to have been made out.

FROM the circuit court of, first district, Hinds county.

HON. ROBERT POWELL, Judge.

Bussey and others, appellees, were plaintiffs in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court. The case was once before in the supreme court and is reported, *Bussey* v. *Gulf & Ship Island Railroad Co.*, 79 Miss., 597.

The suit was an action for damages by the next of kin of Thomas B. Bussey, who was killed by being run over by the freight train of defendant on which he was the front brakeman. The declaration alleged that while the train was in motion, and when the deceased, in the orderly discharge of his duties, walked out on the running board of the locomotive, a car of the train was derailed, causing a sudden and violent stop and jerk of the train, in consequence of which deceased was thrown off the train and run over and killed; that such derailment was caused by a loose and sunken joint between two rails, which defendant negligently suffered to be out of repair. Defendant

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Statement of the case.

pleaded the general issue, and the contributory negligence of deceased in going out on the running board of the locomotive, and thence to the pilot, while the train was in motion, and in recklessly placing himself on the track in front of the train while it was in motion. The evidence for the plaintiffs shows that deceased was head brakeman on the freight train of the Laurel branch of defendant railroad, which intersects the main line at Saratoga. The trains on this branch usually come into Saratoga and switch off on a sidetrack. The branch line runs east and west, and five hundred feet east of the switch on the branch line there is a trestle one hundred and fifty-four feet long over a stream eight feet deep, and still further east another trestle one hundred and eighty-four feet long. Trains coming into the switch sometimes stop for the switch to be thrown, and sometimes simply slow up, and the head brakeman would get off and run ahead of the train and throw the switch before the train got to it. On the 18th day of March, 1901, the train on which deceased was brakeman came into Saratoga, and was running about three or four miles an hour when it reached the trestle farthest east. At the eastern end of this trestle there was a low joint in the road, and at this point the trucks of one of the freight cars, near the rear end of the train, was derailed, and the wheels ran along on the crossties for about sixty feet, when they were thrown crossways the track, and the train stopped. Deceased was found near the western end of the western trestle, having been run over and mutilated by the engine and several fright cars. The distance from where the body was found to the switch was four hundred and seventy-four feet, and that the body was found where the engine would have been on the track when the derailment occurred. It was deceased's duty to get off the train and throw the switch, and that, the last seen of him, was when he got out of the cab window on the running board of the engine, ostensibly to perform this duty. The evidence does not disclose positively how deceased came to his death. The evi-

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Brief for appellant.

dence for defendant was to the effect that there was no low or defective joint, as testified to by plaintiff's witness, but there was a fish bar under the joint, and that the roadbed had not been repaired, and trains had constantly passed over the place for a long time since the accident in perfect safety. The engineer testified that Bussey was reckless, and that he had remonstrated with him about getting on the pilot of the engine; that he last saw deceased going out of the fireman's window, towards the front of the engine; that some one gave a signal that the switch was open, and the train went right on in, the switch having been opened by Bussey or some one else. If Bussey opened the switch, the point at which his body was found shows that he came back towards the moving train.

E. J. Bowers and *McWillie & Thompson,* for appellant.

The evidence showed that the deceased had left the cab of the locomotive presumably to throw a switch, and that at the time of the derailment the train was going only three or four miles an hour, there being a work train on the track ahead of it which necessitated very slow progress; while there were sixteen cars in the train, but one was derailed, and that this one, which was the fifth car from the caboose at the rear end, was not thrown off the roadbed where the accident happened, but simply off of the rails. The plaintiffs proved by one of their own witnesses that at the time of the derailment the train was going only three or four miles an hour, and it was shown by a witness for the defendant that the train was working no steam, was barely moving, and would have stopped anyhow in another car length. It further appears that the derailed car car ran along on the ties fifty-seven feet, just about a car length, when the truck seems to have turned lengthwise with the track and the train stopped. There was no reason why there should have been any jar or jerk at the forward end of the train, from the fact that one car near the rear end of the train ran along on the ties, and the train was evidently about to stop anyhow when the truck

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Brief for appellant.

was displaced. It may well have followed that by the time the slack of the train was taken up from car to car the derailment of the car near the end would have caused no perceptible jar at the forward end of the train. Certainly the plaintiffs produced no evidence of any jar as far forward as the locomotive, and the defendant showed by the fireman, Reames, who was on the locomotive, that there was no perceptible jar at that point, and it did not attract the attention of the conductor, Brazil, who was also on the locomotive and did not notice when the derailment occurred.

This is an important matter in the consideration of this case, for it is claimed that the deceased was jarred from the locomotive where there was no jar, and also because unless the deceased was killed in consequence of some jar of the locomotive resulting from the derailment of the car, it is immaterial whether or not the defendant had negligently left out of repair the sunken joint which was alleged to be the cause of the derailment.

Furthermore, as will be hereinafter more fully considered, the plaintiffs did not show whether the deceased came to his death before the train stopped or after it again moved forward, or whether or not it resulted from his standing on the track in front of the approaching locomotive and the eleven forward cars which had been cut loose from the derailed car on the trestle, and the failure to repair the sunken joint, the only act negligence alleged, may have been entirly without import or relevancy.

The plaintiffs introduced three witnesses, one of whom is the brother of the deceased. Two of them testified that there was a sunken joint on the earth near the end of the trestle at the next crosstie but one to the end of the trestle; the third testified that there was no low or sunken joint within a few inches of the end of the trestle, as testified by the others; that the joint was not near the trestle, but was on the hard woodwork of the same, and had not sunk any and could not sink, and that

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the nearest joint on the ground was thirty feet distant. The testimony of this last mentioned witness of the plaintiffs is overwhelmingly confirmed by the evidence of the defendant.

But the undisputed evidence makes the pretense that there was a dangerous joint at the point in question absolutely farcical. It is shown by witnesses on both sides of the case that there has never been any work done at the joint in question; that it had remained ever since the accident exactly as it was at the time of the trial; that trains had been passing over it several times a day for nearly two years, and there had never been any sort of ill consequence from its use. The same crossties are still there with the marks on them, etc., and in all of the long period that had elapsed it had served every purpose of a safe track. Moreover, the plaintiffs' star witness, Harrell, admits that the joint was secured by a fishbar connection, and this sort of connection is shown to consist of a plate of steel from eighteen inches to four feet long, rolled so as to fit on the sides of the rails, which are end to end, and when fastened to the rails with bolts holds the ends of the rails in place and makes virtually a solid rail. Where this connection is employed there is practically no joint and no sinking of the kind described as taking place at low joints.

Moreover, it is quite evident that this derailment, which had no connection with the injury of the deceased, was caused by an occurrence which no care can guard against and in respect to which negligence was not charged, viz.: the breaking and falling of a brake shoe over which the wheels of the car passed.

The plaintiffs did not prove that the deceased fell or was thrown from the locomotive at all, either by a sudden jar or from any other cause, and the evidence strongly negatives the idea that he came to his death in that way. This failure of proof is very important, for the deceased being an employe the statutory presumption of negligence does not arise, although the injury resulted from the running of defendant's train. *Short* v. *Railroad Co.*, 69 Miss., 848.

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Brief for appellant.

He certainly was not thrown, nor did he fall from the running board of the engine, as alleged in the declaration, for it is undisputed that his body was found in the middle of the track between the rails, the lower half thereof hanging down between the crossties, and the evidence shows that the running board on each side of a locomotive projects out over the rails, and that it is a physical impossibility for a person to fall or be thrown therefrom so as to come down in the middle of the track. The witnesses say that in such case one would fall on the outside of the track, and it is as absurd to expect one so falling to be in the middle of the track as it would be to suppose that a person who had rolled over the eaves of a two-story house would alight in the center hall of the first story.

Moreover, it is to be presumed that the deceased left the cab of the locomotive to arrange the switch so as to admit the train into the "Y" where it was destined to go, and a few minutes afterwards a lantern signal was given at the switch to come forward, and when the train proceeded to go forward the switch was found to be all right, and as it should have been had he adjusted it. It is conclusive on the undisputed evidence that he went forward and adjusted the switch and recklessly and without cause went back on the trestle to meet the train he had signalled to advance, instead of waiting for it at the switch, where in the proper discharge of his duty he would have resumed his place on the train.

It was sought on the trial to show that the deceased did not have time to go forward and open the switch and get back to the place of the accident, and this through many confusing questions put to the conductor and fireman, but the court will observe that those witnesses steadily insisted that they did not then foresee the importance of giving attention to this, and that their idea of the lapse of time was not sufficiently accurate to say whether he had time to do so or not.

It was not shown how the deceased came to his death, and as

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this court has well decided, a jury is not warranted in imposing liability upon a conjecture.

Indeed, the evidence strongly tended to remove all doubt as to the matter by showing that the deceased did not receive the fatal injuries sustained under circumstances which made the defendant chargeable with the negligence alleged, but in a manner wholly different from which no imputation of negligence could arise.

The deceased was evidently killed while in front of the engine and while the train was in motion. Does it make any difference in legal contemplation whether he met his death while attempting to return to the advancing train or while descending from the pilot? In either case he was guilty of the gravest contributory negligence. It is hard to imagine anything more reckless than an attempt to alight on a trestle at night in front of the pilot of a moving train, when the smallest miscalculation of distance, the slightest misstep, the briefest imaginable detention would result in fatality. If that is what was done by the unfortunate young man, he was certainly entitled to the reputation for recklessness which he had among his fellow employes.

The plaintiffs relied greatly on the testimony of the conductor that other employes and himself when a brakeman had been equally reckless, but that in no way affects the case. He shows that it was a dangerous feat, that the deceased had a right to remain on the train until it stopped, and that his getting in front of the engine was wholly unnecessary, as the train was about to stop and was going to stop in ample time for him to open the switch in safety. The plaintiffs also cried aloud over the fact that the conductor saw the deceased go out of the window on the running board and pass forward without stopping him. In this connection, we ask the court to note that the conductor gave the deceased no order to do anything, much less to take the great risk he assumed, and that even had the con-

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ductor been able to anticipate that he would try to descend in front of the pilot before the train stopped, his failure to stop the deceased, if indeed he had opportunity to do so, would impose no liability on the defendant. It is shown that the conductor had cautioned him against his recklessness, remonstrating with him against this very thing of getting on and off the pilot of moving trains, telling him he would be killed sooner or later, and even threatening to discharge him if he did not desist. The conductor did not recollect whether or not he so remonstrated with him on this last trip, but mentioned Taylorsville as one of the places where he did so, and Mr. Dabbs, one of plaintiff's witnesses, shows that he did so on this very trip and that the point was Taylorsville, only nineteen miles from Saratoga, something less than an hour's run.

No argument is needed to satisfy any unbiased mind that if the deceased undertook to descend from the pilot while the train was in motion at night and upon a bridge, he was guilty of contributory negligence, and we will not discuss the question but content ourselves with referring the court to the diagram given in the Standard Dictionary under the title "locomotive" for the location, etc., of the running board and pilot, together with the testimony of the conductor in regard to the character, construction and uses of those parts.

Alexander & Alexander, for appellees.

The cause of the death — that is, the derailment — was clearly shown, but the exact manner of it can never be positively ascertained. A freight car moving about four miles an hour was derailed, and after running a few feet on the cross-ties the trucks turned suddenly around lengthwise of the track on a new and strongly built trestle, and as the steam on the engine had been shut off, the train suddenly stopped. It could not possibly go further, as the wheels of the trucks fell between the ties on the trestle, and a movement of even a foot or two

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would necessarily have torn the trucks from the car or lifted the end of the car up and over the trucks, and as the proof shows, a single crosstie was broken by the strain when the train stopped. Certain it is that a long train, going at the rate of three to four miles an hour, was suddenly derailed and stopped more than four hundred feet from the switch.

We have, therefore, the case of a long freight train moving along with the steam off under its own momentum suddenly stopped by one of the trucks of the car being wedged in immovably unto a trestle, and as it had to stop instantly and completely and no couplings broken, the whole train had to stop just as suddenly. Bussey at the time was somewhere about the engine, where his duties were calling him. No one saw him fall, but his body was found after the derailed car was uncoupled and the forward part of the train pulled out. His body was found just where he was at the time of the derailment. Not only do the company's own witnesses swear to this fact, but it is shown by taking the number of the box cars ahead of the car derailed and taking their average length and computing the distance to the engine and then comparing with the distance from where the derailed car was found to the point where the body was found. Certain it is that Bussey fell from that engine, and it is equally certain that his fall was coincident in time with the derailment and consequent sudden stopping of the train.

The cause of the derailment was a low joint. There is some conflict in the evidence as to whether the joint was so low or loose as to be dangerous, but the finding of the jury is conclusive of this question of fact.

There was an effort to show that Bussey was reckless in the matter of jumping off and on the pilot of a moving engine. We concede the jumping off or on of a moving train would be contributory negligence, whether the person was ordinarily reckless or not. In that respect it seems to us that the evidence

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is wholly immaterial. We suppose it will be contended that it is material in order to support the conjecture that he endeavored to jump on the pilot, after having opened the switch, this being the defense set up in the second plea or notice under the general issue.

It is not averred, or attempted to be, that in what Bussey did do he had ever been guilty of negligence, or in fact that it was negligence. On the other hand it was shown by an experienced railroad man that he had been out on the running board when the train was moving at the rate of twelve miles an hour, and that it was not dangerous. In fact, Brazil testified that the running board is placed there to enable employes to go around to the front while the train was running and without stopping the train. There was "a handhold around the front of the boiler on the engine." Harrell further testified that he has seen thousands of employes do what Bussey did, and that it was no more hazardous than any other place on the engine. The usual place of a brakeman between stations, when he has no duty to perform, is on top of the box car, and the rules of the company require him to be there until he has to go forward or backward in the discharge of his duties. Surely it cannot be any more dangerous, or nearly so dangerous, to be standing on the footway, which is made to stand on and where there is a handhold made for the purpose of holding on to, than it is to stand without any handhold on top of a box car.

Numerous instructions were granted for the defense which gave it more than it was entitled to.

While we do not invoke the statutory presumption of negligence, we say that we have abundantly shown the cause of the injury in the derailment. It is not required to establish causal connection between the negligent act and the injury beyond every reasonable doubt. It may be shown by circumstances. In fact, it is most often shown by circumstances. The rule that causal connection may be shown by circumstances and may be

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inferred from the fact that there was no other visible cause than the one shown is well recognized by the authorities.

Our courts have frequently held that this causal connection may be shown by circumstances. Even when the statutory presumption is invoked the plaintiff must yet show connections between the act of negligence and the injury. Juries have been allowed to infer such connection in many cases, such as the presence of dead animals near the track where there was no other cause shown besides running the train. Again, fires originating near the track, with no other known source for the fire, are inferred to passing engines.

Both negligence and causal connection may be shown by circumstances and a fair preponderance of the evidence. 21 Am. & Eng. Enc. Law, 516; *Brownfield* v. *Chicago, etc., R. Co.*, 5 Am. Neg. Rep., 331, 334; *Union, etc., R. Co.* v. *DeBusk*, 8 L. R. A., 350; *Daileman* v. *Saalfeldt*, 175 Ill., 310; s. c., 48 L. R. A., 753; *Woodman* v. *Metropolitan R. Co.* (Mass.), 4 L. R. A., 213; *Penn. R. Co.* v. *Huber*, 5 L. R. A., 439.

The burden of showing contributory negligence is on the defendant. It is not incumbent on the plaintiff to do more than show the negligence (the low joint) and reasonable consequence thereof (derailment), and the natural consequence of this derailment (the fall), it then devolves upon the defendant to show that Bussey was guilty of contributory negligence. This they have not done. They do not even show a theory which is tenable. Two theories are set up but neither of which is supported. There is nothing but vague conjectures to support the defense of contributory negligence.

Not only is it true that the defense of contributory negligence must be affirmatively shown and cannot be established by mere conjecture, as above stated, but it is well established that in favor of due care the jury may consider the natural instinct of self-preservation. See *Gay* v. *Winter*, 34 Cal., 153; *Denver Tramway Co.* v. *Reid*, 4 Col. App., 53, 35 Pac. R., 269.

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Opinion of the court.

To the same effect *Atchison R. Co.* v. *Hill,* 57 Kan., 139; s. c., 45 Pac. R., 185; *Northern Central R. Co.* v. *State,* 31 Md., 357, 100 Am. Dec., 65.

Argued orally by *T. A. McWillie* and *R. H. Thompson,* for appellant, and by *C. H. Alexander* and *Chalmers Alexander,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

This action is founded upon the negligence of the master itself, in not providing a safe way, and was hence manifestly maintainable, without reference to section 193 of the constitution. *White* v. *Railroad Co.,* 72 Miss., page 12, 16 South., 248. That section is therefore not involved in this case. The only point worthy of serious consideration is whether the plaintiff was guilty of contributory negligence. The theory that Bussey got down off the pilot on the trestle, went forward, threw the switch, and returned towards the engine on the trestle—the engine moving all the while at four miles an hour—and was killed in trying to jump on the pilot, is utterly untenable. It was, in view of the distance from the point where he would have so gotten off, to the switch, a physical impossibility that the injury could have occurred in that way, as a simple mathematical calculation will demonstrate. The theory that the derailment was caused by a brake shoe falling on the rail has the testimony of but one witness, and that of the most shadowy kind, to rest on. The presence of the brake shoe may very easily be accounted for by the fact of the wrenching around under the cars of the trucks. The testimony makes no such case. The theory of the plaintiff is that the derailment of the cars caused a sudden, violent jerk, which threw the plaintiff, and caused him to fall from the front of the engine to the trestle, and that he was then run over and crushed by a number of cars before the train came to a stop. That he was run over and crushed is shown by the manner in which his body was muti-

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lated. That it was a sudden and violent jerk or jar of the train which projected him forward on the middle of the trestle has been found by the jury to be the most reasonable and probable cause of his death. The jury evidently found it more reasonable than the opposite theory, that he would attempt to get off the train moving about four miles an hour, on a trestle. There was no occasion to do so. It was perfectly easy for him to have waited until the train got on solid ground, and then have gotten off, gone forward, and thrown the switch. None of the theories presented by the defendant commended themselves to the jury as at all probable or reasonable. They evidently discredited both the statement that any derailment signal was given, and the other most remarkable statement by one of the crew that he felt no jar from the derailment. When one considers the nature of the mutilation of the body, the fact that trucks were wrenched around at right angles under the derailed car, that one of the new crossties was actually broken by the violence of the movements of the train, the distance run by the cars on the crossties of the trestle after the derailment, and the further fact that the train was moving at about four miles an hour—a heavy freight train, with sixteen cars—the statement by one of the crew that he, under these circumstances, felt no jar at all, was naturally discredited by the jury. What we regard as very strongly convincing evidence, quite sufficient to warrant the correctness of the jury's conclusion, is the admitted fact—a fact testified to by defendant's witnesses—that the body of Bussey was found at the point where the engine would have been when the derailment occurred. This is a most pregnant fact, from which the jury may very reasonably have inferred that, at the very instant of the derailment, Bussey was thrown by the jar from the front of the engine to the middle of the trestle, and there run over and killed. It is shown by the testimony, so far as contributory negligence is concerned, that it is not unsafe to be on the running board leading round to

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Opinion of the court.

the front of the engine. It was customary for employes to go around on that running board, holding by the hand hold, and light the headlight, while the train was in motion. We think the conductor meant by the language that he would not have told Bussey more than twice to go, before he would have "fired" him, that it was Bussey's duty, and, if he had to tell him more than twice to do his duty, he would have discharged him. That seems the plain meaning, from the context. What the jury evidently believed was that Bussey went around to the front of the engine, and was waiting there for the train to get on solid ground, with no purpose at all of getting off on the trestle, and this is as reasonable an inference as can be drawn from the testimony—we think the most reasonable one. If the evidence had shown that Bussey was thrown off or fell off whilst trying to descend from the front of the engine to the trestle, he was clearly guilty of contributory negligence of the most flagrant kind, the train moving at about four miles an hour. But when the distance from the end of the trestle to the switch is considered, and the fact that Bussey had the most abundant time in which to have gotten off on the ground and have thrown the switch, there is no rational ground upon which to base the conjecture that he entertained the foolhardy purpose of attempting to descend from that moving train to the trestle.

We have given every phase of the case painstaking consideration, and are not able to say that the verdict is manifestly wrong.

Affirmed.

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Statement of the case.

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THOMAS J. FULCHER v. STATE OF MISSISSIPPI.

1. JURORS. *Disqualification. Aliens. Constitution* 1890, *Sec.* 264. *Objection after verdict.*

Under Constitution 1890, § 264, providing that jurors must be qualified electors, able to read and write, but the want of qualification of a juror shall not vitiate a verdict, an objection that a juror was an alien and therefore not a qualified elector cannot be made after verdict.

2. SAME. *Absence of knowledge.*

In the absence of a showing that the facts of which an objection to a juror is predicated were unknown to the objecting party and his counsel when the juror was accepted on the panel, the objecton will be unavailing.

3. CRIMINAL LAW. *Murder. Instruction. Self-defense.*

In a murder case a defendant's instruction to the effect that the jury must acquit if there be a reasonable doubt whether at the time the deceased was struck by defendant he was attempting to strike defendant with a hoe, may be properly modified by adding thereto the words, "If you believe the hoe was a deadly weapon in the hands of deceased, and that it was really or apparently necessary for the defendant to strike to protect himself."

FROM the circuit court of Yazoo county.

HON. ROBERT POWELL, Judge.

Fulcher, appellant, was indicted and tried for the murder of one McNeal; he was convicted of manslaughter and appealed to the supreme court.

The evidence for the state was substantially as follows: Appellant and deceased were neighbors, their fields lying adjacent, and separated by a wire fence. McNeal was a small man, and about seventy years old, and Fulcher was forty-five years old, and weighed one hundred and fifty pounds. Appel-

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Brief for appellant.

lant and deceased had been on good terms up to the day the fatal blow was struck. On that day Fulcher quit work about five o'clock in the afternoon, put his hoe on his shoulder, went over the cross fence to where deceased was hoeing a few feet from the fence, in his own field, told him he must keep his chickens out of appellant's field, and deceased replied that he could not do so. Fulcher then became angry, and hit deceased in the face with his fist, and then struck him on the head with a hoe, and at this time deceased was not making any attempt to strike Fulcher with his hoe, but had left it some distance away. The evidence for the defense was to the effect that deceased's stepson had circulated scandalous reports about defendant's daughter; that defendant had seen deceased about this, and deceased had promised to correct the boy, and at the time of the difficulty Fulcher was on his way from one part of his field to another, his path leading near where deceased was working, and, as he approached, deceased beckoned him to come by, and said to him, "That report you talked about my boy is a lie;" that some angry words then passed, and deceased raised his hoe to strike defendant, when defendant struck deceased with the hoe he had on his shoulder. Deceased lived a little over a week, and died from the effects of the wound. Defendant, on the trial, asked the following instruction (No. 7): "The court instructs the jury that they must acquit the defendant if they believe there is a reasonable doubt whether at the time McNeal was struck by the defendant that he (McNeal) was attempting to strike Fulcher with a hoe." The court added to this instruction the following, "if you believe the hoe was a deadly weapon in the hands of McNeal, and it was really or apparently necessary for the defendant to strike to protect himself," and gave it as thus modified.

E. R. Holmes, for appellant.

The jury that tried and convicted the appellant had as a

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Brief for appellee.

member thereof one A. Narrowitz, who was not a citizen of the United States. This defect is fatal to the verdict, as it did not give the appellant such a trial by jury as is guaranteed to him by the constitution of the United States and of the state of Mississippi. Section 31 of the constitution of the state of Mississippi provides: "The right of trial by jury shall remain inviolate." This has been construed by our court to mean a jury composed of twelve men, and to be such a jury as was provided for at common law. *Wolfe* v. *Martin,* 1 How. (Miss.), 30; *Byrd* v. *State,* 1 How. (Miss.), 163; *Isom* v. *R. R. Co.,* 36 Miss., 300.

It will be seen that Narrowitz was a tales juror, that he was not on the special venire or the regular panel and, therefore, the appellant cannot be held to have waived the objection, as in the case of *George* v. *State,* 39 Miss., 570, for in that case the juror Waller was on the special venire.

In this case Narrowitz was not only a tales juror, but swore on his *voir dire* that he was a qualified elector of the county, etc. This, of course, disarmed the defendant and his attorneys of any suspicions which they might have entertained as to the disqualifications of the juror; and even if it had not so disarmed them, they had no opportunity to investigate and prove the falsity of his statements made on his *voir dire,* as the trial progressed at once and the attorneys and the defendant both had to be present.

The case ought to be reversed because the court erred in modifying the seventh instruction asked by the defense. There was no evidence to show that McNeal was not physically able to inflict great bodily harm if he had attempted to strike Fulcher.

William Williams, attorney general, for appellee.

While it may be true that the juror Narrowitz was born in Vienna, Austria, and was not a naturalized citizen of the state

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Opinion of the court.

of Mississippi or of the United States, on his *voir dire* he qualified as a juror. Appellant and his counsel had every opportunity given by law to test the qualifications of said juror, and after having had this opportunity they accepted him as a juror. The appellant had it completely in his power to ascertain whether the said juror, Narrowitz, tendered to him, was not qualified. The constitution and the statutes of the state are careful of the rights of parties charged with a capital offense. Appellant had a right to examine each person presented as a juror relative to his qualifications, his feelings, and convictions in reference to his guilt or innocence. The question here presented was settled by this court in *George* v. *State,* 39 Miss., 570. In this case this court said sound policy dictates that the accused shall not be permitted, after having a chance of acquittal, to insist as a ground for a new trial, upon a want of qualification in the jurors, of which he might have availed himself as a cause of challenge by using proper diligence. The want of qualification in any juror shall not vitiate any verdict, Section 264, constitution of 1890; section 2354, Code 1892; *Williams* v. *State,* 37 Miss., 407; *Nail* v. *State,* 70 Miss., 32.

The jury had all the facts before them and it was their duty to say whether the hoe in the hands of McNeal was a deadly weapon, and whether it was really or apparently necessary for Fulcher to strike in order to protect himself. The pinciple announced in this instruction is well settled by this court. *Bang* v. *State,* 60 Miss., 571.

CALHOON, J., delivered the opinion of the court.

The objection that the juror, Narrowitz, was not a qualified voter, but an unnaturalized foreigner, was made too late, being after verdict. Moreover, it nowhere appears, by affidavit or otherwise, that this fact was unknown to the accused or his counsel when the juror was accepted. Const., sec. 264; *Tolbert* v. *State,* 71 Miss., 191, 14 South., 462, 42 Am. St. Rep., 454; *George* v. *State,* 39 Miss., 570.

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Statement of the case.

The court below did not err in its modification of the seventh charge asked by the defendant.

Affirmed.

EDWARD W. COOPER ET AL. *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

ACCORD AND SATISFACTION. *Tender in full settlement. Acceptance. Protest.*

If a creditor accept from his debtor a sum of money tendered in full satisfaction of his debt, and which would not otherwise have been paid to him, there is an accord and satisfaction, and he cannot recover more, although at the time he accepted he protested that more was due, and threatened to sue for the balance.

FROM the circuit court of Sunflower county.

HON. A. MCC. KIMBROUGH, Judge.

Edward W. Cooper and Carl H. Rock, appellants, partners under name of Cooper & Rock, were plaintiffs, and the railroad company, appellee, was defendant, in the court below. The facts were these: Appellants, railroad contractors, entered into a contract with the appellee to clear and grub the right of way of a projected extention of the railroad track. They began the work and were paid in part as the work progressed. When they finished, and desired a settlement in full, a controversy arose between them and the company as to the correct balance due them, there being a material difference between the amount they claimed and the sum admitted to be due them by the company. Not being able to reach a settlement, appellants went to Chicago, the home office of the company, and after repeated and extended interviews there with the chief engineer of the company, not being able to reach an agreement, the engineer

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Brief for appellants.

agreed to pay them $6,053.65 in full settlement of the claim. They declined this, but the engineer had voucher made for that amount and tendered it to appellants, stating that the payment was in full settlement and satisfaction of the claim. They accepted the voucher and signed a full settlement receipt, cashed the voucher, and used the money. They afterwards brought this suit against the railroad company to recover the balance claimed to be due them. On the trial they testified that they accepted the voucher, but at the same time stated to the chief engineer that they did not waive their right to the balance, affirming that they would take the voucher, and give the company credit for it, and sue for the balance; but they also testified that the engineer would not agree to this, and told them that they could either accept it in full settlement or stand upon their demand and litigate. The court below gave a peremptory instruction for defendant. From a verdict and judgment in accordance therewith, plaintiffs appealed to the supreme court.

Johnson, Chapman & Neill, for appellants.

Was there an accord and satisfaction by the final settlement in Chicago? The general rule is laid down in 1 Cyc. 319.

"(I) *Statement of general rule.*—When the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of a less amount than is due operates only as a discharge of the amount paid leaving the balance still due, and the creditor may sue therefor notwithstanding the agreement. A court of equity has no power to enjoin collection of the balance.

"(II) *Reason for rule.*—The reason for the rule is that the agreement is without consideration and void, as the debtor is under an obligation to pay the whole debt at the time and the

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creditor is entitled to receive the whole. The doctrine has been freely criticised in most of the courts which have had occasion to consider it; but with one exception they have nevertheless adhered to it, unless, as in the case of some jurisdictions, it has been abrogated by express statutory provisions.

"(III) *Extent of rule.*—The general rule is not affected by the fact that the debtor has a surety and that the debt is due by bond, nor by the fact that payment of a less sum is made by depositing in the bank and giving check thereon, as this does not change the character of the payment or give it an effect other than if the money had been paid directly. So, also, the rule is not affected by the fact that the debt is a judgment debt. The desire of the parties to avoid trouble and contention is not recognized as constituting a legal consideration for such agreement. Neither does the fact that the debtor borrowed the money to make the settlement at the creditor's request affect the rule.

"(V) *Rule, how affected by giving receipt in full.*—In the absence of statute providing otherwise the rule is settled, except in one state (Connecticut) that the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof though accepted as such, and it is immaterial that the debtor knew that there was error or fraud."

We call the attention of the court to the authorities cited in the notes in support of the text which we have copied. This subject in this cyclopedia is edited by Seymour D. Thompson. A full discussion of this subject with the same conclusion as to what is the law is found in the notes to *Jones* v. *Perkins,* 29 Miss., 139, 64 Am. Dec., 138; also in notes to *Fuller* v. *Kemp,* 20 L. R. A., 785.

The reason of the rule as given in the text book quoted and as is set out in many of the authorities is that the agreement to take a less sum in payment of the whole debt is without con-

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Brief for appellants.

sideration and therefore void. The rule and the reason for it may be technical, but so are very many of the revered principles of the law. A rule of the common law, set up and adhered to for nearly three hundred years, should not be ignored and disregarded by the courts as technical and unreasonable any more than a statute should receive this treatment.

The reason of the rule under discussion may receive some light from the examination of a collateral or kindred question, the compromise of doubtful controversies. "To make the compromise valid, both parties must concur in supposing the right to be doubtful, for if the claimants knowing his claim to be groundless, forces the other party to a settlement by threats of suit, the compromise will be void." 6 Am. & Eng. Enc. Law, 714. The rule is even stronger than stated; if both parties believe the claim to be doubtful when in fact and in law it is wholly without foundation, a note for the payment of a certain sum in compromise is without consideration and uncollectable. *Foster* v. *Metts,* 55 Miss., 77.

For a full discussion of the principles involved in cases arising out of invalid claims based upon settlements of controversies we call attention to the Alabama case of *Thompson* v. *Hudgins,* 22 So. Rep., 636. The giving up of a part of a liquidated debt after maturity, at the place appointed for payment, without consideration, is not a binding contract. *Demars* v. *Musser Sauntry S. S. & Mfg. Co.,* 37 Minn., 418.

The opinion of the court in *Clayton* v. *Clark,* 74 Miss., 499, is a very striking and plausible argument, all precedents aside, as to what the common law ought to be; but in the light of the authorities we respectfully submit it reaches a wrong conclusion as to what the common law is.

The rule we have been discussing applies to liquidated claims. Let us see if the debt sued for in this case is properly a liquidated demand. The contract which is the basis of this suit is for the building of a road between certain named points.

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Brief for appellants.

Section 8 of the contract provides that when the work is fully completed, "the party of the second part will pay the parties of the first part in full for the performance of same, as follows, to wit: for clearing and grubbing, fifty dollars per acre."

There could be no difficulty, and there was none, in ascertaining the exact number of acres in the job. The engineer in charge of the work testified that there were two hundred and seven and seventy-seven hundredths acres. This measurement absolutely fixed the amount of compensation for this class of work due the contractors. If the amount due can be ascertained by arithmetical calculations, it cannot be said to be unliquidated. *Cincinnati* v. *Cincinnati St. R. Co.,* 6 Ohio N. P., 140.

It is not even shown by any witness that there were some of the acres on the line upon which no clearing and grubbing were done; on the contrary, Cooper testifies that clearing and grubbing were done on every acre of the line. There was no suggestion that any part of the clearing and grubbing was improperly done, none of this work was rejected or discarded by the enginner in charge.

The measurements and calculations were wholly in the hands of appellee. It was unjust to the contractors that this trust should be abused in order to reduce the compensation they were to receive for the job. The report was none the less fraudulent by reason of the fact that appellant detected its inaccuracy. Appellee set up a false basis for a settlement and thereby succeeded in retaining a part of the money that justly, under the contract, belonged to appellants. "If, however, the accord and satisfaction is procured by fraud on the debtor's part—as, for instance, by false representations or by the suppression of material facts—it is not binding, since fraud vitiates all contracts, and hence, in an action on the original obligation the effect of the accord and satisfaction may be avoided by showing these facts. 1. Cyclopedia of Law and Procedure, p. 338, author-

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Brief for appellee.

ities cited in notes; see also *Fire Ins. Assn. Limited* v. *Wilkham,* 141 U. S., 564, 35 L. Ed., 866.

In passing upon the question as to whether the settlement in Chicago was an accord and satisfaction the manner of its procurement as well as the other facts and circumstances surrounding the parties at the time should be taken into consideration. According to the terms of the contract the amount due the contractors was a certain fixed sum, to be arrived at by a simple calculation, all of the data for which were ascertained, and not controverted. A different sum from the amount due was paid, based upon a false report of the engineer, unwarranted by any legal construction of the contract, when he well knew, and his employers well know, the proper amount. We insist that in this case the payment of a part of the debt, even if accepted and agreed on as a discharge in full of the whole debt, is not binding upon the appellants. *Demars* v. *Musser Sauntry L. Mfg. Co.,* 37 Minn., 418. Lastly, under any view of the case, to consider part payment of the debt an accord and satisfaction it must have been so agreed upon and understood by the parties. The law on this subject with the authorities is most admirably stated in 1 Cyclopedia of Law and Procedure, p. 331-*b*. As to whether this payment was made under such circumstances as to be fully understood by the parties to the settlement as in accord and satisfaction, we insist under the proof is a question of fact for the jury under proper instructions as to the law, and should not have been passed upon by the court.

Mayes & Longstreet and *J. M. Dickinson,* for appellee.

The acceptance by plaintiff of the voucher for $6,058.65 and the signing of the receipt "in full settlement," which was a condition precedent to the cashing of the voucher, constitute a complete accord and satisfaction of plaintiff's demands, and barred any recovery. Plaintiff's witnesses show beyond controversy that the voucher for the amount stated was tendered

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Brief for appellee.

to the plaintiff's, both being present, and in full satisfaction of all that was due by the defendant to them under the contract sued on, but that at the time the tender was made the plaintiffs protested that the amount tendered was not all that was due them, and that they would not accept it in full satisfaction of all that was due, but stated that they would give credit for the amount paid and sue for the balance. The testimony shows that the tender was made in full settlement of all that was due and that the plaintiffs were expressly told that if they accepted it at all it must be in full settlement, and that they did accept it, though protesting that it was not all that was due. The question, therefore, presented is, do the facts stated constitute an accord and satisfaction, for if so, the plaintiffs are not entitled to recover in this suit.

"An accord is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is or considers himself entitled to, and satisfaction is the execution of such agreement." Of course, where an accord has been executed it operates as a complete bar to an action on the original claim in the absence of fraud, mistake or duress." 1 Cyc. 307, 309.

It is immaterial in this suit whether the demand is liquidated or unliquidated, for in this state it is expressly held that the payment of a less sum in satisfaction of a greater constitutes a complete accord and satisfaction, even though the demand were liquidated.

It has been generally held throughout the United States that "where the debt or demand is liquidated or certain and is due, payment by the debtor and receipt by the creditor of a less sum than is due is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given." Ib., p. 319. "The reason for

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Brief for appellee.

the rule is that the agreement is without consideration and void, as the debtor is under an obligation to pay the whole debt at the time and the creditor is entitled to receive the whole." This doctrine has been freely criticised in most of the courts which have had occasion to consider it; but with one exception they have nevertheless adhered to it." Ib., p. 321. This exception is the supreme court of this state, for in Mississippi the supreme court, in the case of *Clayton* v. *Clark,* 74 Miss., 499, has broken away from the long-established rule and holds that the payment of a less sum of money for a liquidated debt, and acceptance and satisfaction of the whole, operates to extinguish the whole debt. This case expressly overruled the case of *Burrus* v. *Gordon,* 57 Miss., 93, and disapproves the *dicta* in *Jones* v. *Perkins,* 29 Miss., 139, and *Pulliam* v. *Taylor,* 50 Miss., 251.

In most authorities cited hereafter, in which we attempt to show that the facts in this cause would constitute a complete accord and satisfaction the claims were in dispute or unliquidated, yet the principles announced in those cases apply just as strongly to the case at bar as if the claims were liquidated, for the reason that in this state, on this question, no distinction whatever is made between liquidated and unliquidated demands.

It is unquestionably true that in order to establish a defense of this character there must be present in the transaction upon which it rests all the elements of a complete agreement. That is, there must be a lawful subject-matter, a sufficient consideration and mutual assent of both parties. Clearly there is a lawful subject-matter, and it is equally clear that the consideration is sufficient, for, as stated, in this state it is expressly held by the supreme court that the payment of a less sum in satisfaction of a greater was of itself sufficient consideration to uphold an agreement of accord and satisfaction.

In the case at bar the defendant tendered to the plaintiff an amount of money evidenced by a voucher in full satisfaction of

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all that was due and annexed to this tender, as a part of it, the condition that if it was accepted it must be accepted in full satisfaction of all that was due. The condition on which the money was tendered was made a part of it, and we contend that the plaintiffs could not accept the tender without accepting also the condition, and having accepted both their minds met. On the other hand it is contended by plaintiffs' attorneys that they protested at the time that it was not all that was due them and that they would not accept it in satisfaction of all that was due, but only in part payment, yet the fact remains that they did accept it with the condition annexed to it. The following decisions are directly in point and the facts are not much distinguishable from those appearing in the record of this suit: *McDaniels* v. *Lipham,* 21 Vt., 222; *Preston* v. *Brant,* 34 Vt., 201; *Towslee* v. *Healey,* 39 Vt., 522; *Boston Rubber Co.* v. *Peerless Wringer Co.,* 58 Vt., 553; *Bull* v. *Bull,* 43 Conn., 455; *Potter* v. *Douglass,* 44 Conn., 541; *Reed* v. *Boardman,* 20 Pick., 441; *Donahue* v. *Woodbury,* 51 Am. Dec., 777; *Hilliard* v. *Noyse,* 58 N. H., 312; *Brick* v. *Plymont Co.,* 63 Iowa 462; *Huikle* v. *Minn. & St. L. R. Co.,* 31 Minn., 434.

After a very careful examination we have been unable to find a case reported in this state exactly in point. The only case which we have been able to find on the subject is that of *Darrill* v. *Dodds,* 78 Miss., 912.

This case goes a long ways to bear us out in our contention, for it was held by the court that the acceptance of the money operated not only as a satisfaction of the claim of Mrs. Darrill for the value of the trees, but also barred any recovery by her of statutory penalty.

WHITFIELD, C. J., delivered the opinion of the court.

We think there was an accord and satisfaction in this case. The best discussion by far of the doctrine of accord and satis-

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faction we have anywhere found is that by Judge Seymour D. Thompson in 1 Cyc. of Law & Procedure, p. 305 *et seq.* At page 331 he states the law applicable to the case made by the testimony here: "In order that the payment of a smaller sum than demanded shall operate as a satisfaction of the claim, it must be accepted as such. Where a person accepts a tender, but not in full of all demands, this acceptance will not conclude him from claiming more. The nature of the offer or tender by the debtor is an important consideration in determining whether there has been an accord and satisfaction. To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. The mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not necessarily establish an accord and satisfaction. Where, however, a sum of money is tendered in satisfaction of the claim, and the tender is accompanied by such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfection, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction. This is true, although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his claim. Where the tender or offer is thus made the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he accepts it he accepts the condition also, notwithstanding any protest he may make to the contrary." This is the true prin-

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ciple. The debtor making tender of a certain sum in full satisfaction has the right to attach to his tender such lawful conditions as he pleases, and the creditor accepting under such circumstances must accept the tender as conditioned. This is good sense and sound law, and we may add this is the law generally, quite independently of the principle announced in *Clayton* v. *Clark,* 74 Miss., 499, 21 South., 565, 22 South., 189, 37 L. R. A., 771, 60 Am. St. Rep., 521. See, specially, *Fuller* v. *Kemp* (N. Y.), 33 N. E., 1034, 20 L. R. A., at page 809, and also *Bromley* v. *School District,* 47 Vt., 381. Many other authorities to the same effect are collated in the very accurate and discriminating brief of learned counsel for the appellee. See, specially, *Darrill* v. *Dodds,* 78 Miss., 912, 30 South., 4. To hold, in a case where the debtor tenders a certain sum in full satisfaction, and requires a written acceptance of it as received in full satisfaction, which acceptance is duly signed, that the creditor so accepting can, by merely protesting, discharge the tender of the express conditions on which alone it is made, would be to declare that the debtor has not the legal power to attach any conditions to his tender, and this manifestly is unsound.

Affirmed.

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Brief for appellants.

JAMES E. MORTIMER ET AL. v. ANDREW J. HANNAH.

LANDS. *Contracts. Construction. Rescission.*

A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the contract:

(a) When the other party has evinced his intention to abandon or repudiate the contract entirely; or

(b) When the other party has breached the contract in a matter which is vital to its existence, or is of its essence by the terms of the contract or the evident intention of the parties; or

(c) When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract, according to its terms, impossible.

FROM the chancery court of Sunflower county.

HON. CAREY C. MOODY, Chancellor.

Hannah, appellee, was complainant, and Mortimer and others, appellants, were defendants in the court below. From a decree overruling defendants' demurrer to complainant's bill, the defendants appealed to the supreme court. The facts are stated in the opinion of the court.

J. Holmes Baker and *Mayes & Longstreet,* for appellants.

The main purpose of the contract was to get the four hundred acres cleared, the houses built, and the land deadened within the period of eight years, and the provision that the land should be cleared at the rate of fifty acres per annum is not vital.

The bill is filed to obtain a rescission of the contract, purely and simply on the ground that the lessees have not cleared the full one hundred acres, which was the ratable percentage of clearing for the years 1901 and 1902. There is no allegation

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in the bill of any willful or intentional default on the part of the lessee, nor does the bill set out any action by them which would indicate that they are not proceeding with the performance of their contract in good faith and diligently. Indeed, the bill avers that the lessees and those claiming through and under them, are in actual possession of the land under said contract.

The contract, by its stipulations, does not make the ratable clearing of fifty acres per annum a special or particular condition.

In order to get at the intent of the parties it is necessary and proper to consider the instrument as a whole, and to deduce from it its main purpose and scope. When we do this we see the mere matter of clearing any particular proportion or percentage of the land per annum is purely secondary, and that the vital and substantial purpose of the contract is to have all the work done within the stipulated period of eight years.

The court will observe, in this connection, that no time is fixed prior to the end of eight years within which any of the tenant houses should be constructed. By the terms of the instrument the parties have the whole of eight years, or any part of the period, within which to build the houses, and yet the erection of tenant houses is just as essential to the profitable use of delta lands as is the clearing of the land itself.

Mr. Pomeroy, in the third volume of his Equity Jurisprudence (2d ed.), section 1408, says:

"In all ordinary cases of contract equity does not regard time as of the essence of the agreement. In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to

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Brief for appellee.

compel the performance by the other party, notwithstanding his own delay."

And in the third volume of the American & English Encyclopedia of Law, the text and note on page 914 asserts:

"If the breach be in a matter which, upon a fair and reasonable construction of the contract, the parties may be deemed to have considered as vital to its existence, or which they have expressly stated shall be vital, it will discharge the promisee from the performance of his promise. In the absence of an express stipulation, a term is considered of vital importance when it goes to the root of the matter, so that a breach of it would frustrate the main object of the contract."

All the authorities agree that where an effort is made to rescind a contract of sale of land on the ground of default in some agreement connected with the sale, that the party seeking the rescission must show that the default was vital, willful and intentional. The bill in this case does not make any such averment.

In this connection, we call the attention of the court to the authorities cited below, which assert the proposition as follows:

"One seeking to rescind a mutual contract of which time is not the essence, on the ground of delay by the other party in complying with its terms, must show either such willful and intentional delay as will evince the intention of the party delaying to treat the contract as at an end, or that the delay has caused such damages as will render a decree of specific performance inequitable and unjust." *Reed* v. *Mix,* 66 Miss., 1021; 63 Kan., 745; 55 L. R. A., 706; 169 N. Y., 583.

Johnson, Chapman & Neill, for appellee.

The bill clearly states a failure on the part of the defendants therein to comply with the terms of the contract. They were to put the land in a state of cultivation at the rate of fifty acres per year, so that at the end of the eight-year lease there should

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be four hundred acres under the plow. Appellee, under the contract, had the right to have the stipulated number of acres put in cultivation each year so that he could be assured that at the end of the eighth year, the length of the lease, his half of the land would begin to yield revenue. The bill shows that only a small part of the required number of acres was put in a state of cultivation in the two years. This gave appellee the right to rescind the contract. "The most frequent ground for rescission amongst those arising after the making of the contract is that of nonperformance; in other words, if one party to a contract fails to perform what the stipulations therein bind him to, the other, upon such failure, may rescind. This applies when the nonperformance is simply a refusal by one to fulfill the contract, or when it arises by reason of his inability to do so." 21 Am. & Eng. Enc. Law (1st ed.), 44; *Johnson* v. *Tuggle,* 27 Miss., 845, 846; *Moak* v. *Bryant,* 51 Miss., 560; *Gullich* v. *Alford,* 61 Miss., 224.

The cases in which a court of equity exercises the jurisdiction to decree the surrender and cancellation of written instruments are, in general, when the instrument has been obtained by fraud, where a defense exists which would be recognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the original holder did not possess, and where the instrument is a cloud upon the title of plaintiff to real estate. 18 Enc. Pl. & Pr., 750; *Hamilton* v. *Cummings,* 1 Johnson's Chy., 520; 1 Pomeroy's Eq., secs. 110-112.

The chancery court having assumed jurisdiction of this cause its decision on this point is final. This court will not review the decision of the lower court and pass on the question whether or not the case more properly belongs in a court of law. Constitution of Mississippi, 1890, sec. 147.

TRULY, J., delivered the opinion of the court.

Appellee, on the 9th of February, 1903, filed his bill of com-

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Opinion of the court.

plaint against appellants seeking to rescind and have canceled a certain contract of lease and sale for causes set out in his bill. The facts are these: On the 9th of February, 1901, A. J. Hannah, being the owner of a tract of wild land containing five hundred acres, executed a contract of lease and sale to Sibley & Mortimer. In this contract it was provided that the term was to expire the 1st of January, 1909, at which time Hannah was to deed an undivided half interest in the property, conditioned that his lessees should carry out their part of the contract. In the contract the said Sibley & Mortimer bound themselves to put in a good state of cultivation not less than four hundred acres of land at the rate of fifty acres per annum from the date of the contract, and agreed to deaden all of said land not put in cultivation, and to erect twelve houses, as described in the bill. It will be observed that while the lessees obligated themselves to put four hundred acres of land in cultivation "at the rate of fifty acres per annum," the contract contains no provision as to when the balance of the land is to be deadened, nor when the twelve houses mentioned are to be built. By mesne conveyances the interest of Sibley was conveyed, and is now vested in the other appellants. The bill of complaint, filed immediately upon the expiration of two years of the term, avers: "That none of the defendants have cleared the land at the rate of fifty acres per annum from date, as stipulated in said lease. The said defendants have failed to erect any of the twelve houses, as provided in said contract." Complainant alleged that at the date of the filing of the bill there was not one hundred acres of land cleared up and put in a state of cultivation by any of the said defendants on said land, but only a very small part of said one hundred acres, and there are no houses erected at all. Complainant offered to pay defendants any amount that, on cancellation of contract, the court might think "suitable and just for the improvements made." The bill further states as follows: "Complainant is advised, and so charges

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Opinion of the court.

the fact to be, that the said defendants, by their failure to comply with the terms and stipulations of said contract and lease, have forfeited all rights in the said land, and said complainant is entitled to have the said contract and lease canceled, and he be put in possession of the said land." To this bill a demurrer was interposed by the defendants. Demurrer overruled, and defendants appeal, assigning the ruling of the court in the premises as error.

The sole question presented by this record is, Is the appellee entitled to a rescission of this contract under the facts stated? It will be noted that the only breach assigned is that the appellants have not put the land in cultivation "at the rate of fifty acres per annum." No breach is averred as to the "deadening" of the land or the building of the houses, and none could be; for under the terms of the contract these could be performed at any time before the termination of the contract. We have given the matter the careful consideration which the importance of the legal principle involved demands, and after an exhaustive review of all authorities at our command, we formulate and announce as the true rule governing the class of contracts here under discussion the following, viz.: A party to an equitable mutual contract in reference to realty, fairly entered into, has the right to rescind such contract for the following causes: First. When the other party has evinced his intention to abandon or repudiate the contract entirely; and this intention may be shown by express declaration, or by such acts and conduct in reference to the subject-matter of the contract as would prove such intention. Second. When the other party has breached the contract in a matter vital to its existence, or made of the essence of the contract by the terms of the contract itself, or by the evident intention of the contracting parties. Third. When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the one with whom he has contracted, for which no adequate redress can be had, or

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Opinion of the court.

which might inflict irreparable injury, or which renders a final completion of the contract according to its terms impossible.

This statement of the rule is in absolute harmony with all previous deliverances of our own court upon the subject, and is supported by the great weight of the most approved authorities and numerous decisions of other states. In *Moak* v. *Bryant,* 51 Miss., 560, the court says: "The vendee must repudiate the contract under which he entered, or fail to comply with its terms," meaning, of course, in some substantial part of the contract. In *Gullich* v. *Alford,* 61 Miss., 224, the rule is recognized that the breach must be in some matter which is "of the essence of the contract." And in *Light Co.* v. *Jackson,* 73 Miss., 642, 19 South., 774, it was held that, while courts were reluctant to grant rescission, still it might be had when adequate damages for breach could not be had at law, or when a partial breach might result in irreparable injury, but that generally rescission would not be decreed unless the breach was one "going to the very substance of the contract." See, also, Waterman's Specific Performance, sec. 456; Pomeroy's Equity Jurisprudence (2d ed.), sec. 1408; *Reid* v. *Mix,* 63 Kan., 745, 66 Pac., 1021, 55 L. R. A., 706; *Keenan* v. *Brown,* 21 Vt., 86; *Rhymny Ry.* v. *B. & M. T. J. Ry.,* 69 L. J. Ch., 813; *Mixer* v. *Williams,* 17 Vt., 457; *Md. Fertilizing & Mfg. Co.* v. *Lorentz,* 44 Md., 218. See, especially, *Worthington et al.* v. *Gwin* (Ala.), 24 South., 739, 43 L. R. A., 382, and citations.

Viewed in the light of the foregoing statement of the rule, does the case at bar fall within any of its terms? As to the first, it cannot be contended that the defendants (appellants here) have expressly repudiated the contract, or by act or deed shown any intention of abandoning it; on the contrary, the bill of complaint shows that they were still in possession under the terms of that contract, and it nowhere appears that they were not then engaged in carrying out its provisions. Nor, in the second place, has the contract been breached in a matter vital

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to its existence, or made of the essence of the contract by the terms thereof. The main object of the contract in the case at bar was the clearing and putting in cultivation of four hundred acres, and the building of twelve houses, and the deadening of the remaining one hundred and sixty acres. Manifestly, the essential thing in the minds of the parties was that at the end of eight years this tract of wild land was to have been changed into an improved and cultivated plantation, for their mutual benefit, so that each might share in its enhanced value and revenue producing power. The provision that fifty acres of land were to be put in cultivation each year is simply a statement of proportion — an estimate of the amount to be annually cleared. It nowhere appears that this provision of itself was intended to be considered of vital importance, and it is not made of the essence of the contract by the terms thereof. As a matter of fact, the appellee himself did not so consider it, because the bill of complaint herein avers that, while the defendants have been in possession for two years under the contract, only a very small part of the one hundred acres has been put in cultivation. If this allegation be accurate, then the alleged breach upon which he now claims rescission occurred at the expiration of the first year, and it might be argued with great force that the appellee had waived what he now claims as a breach by allowing the defendants to remain in possession performing on their part the conditions of a contract which he considered at an end. Nor does the allegation of the bill of complaint show that the case falls under the third general clause of the rule as before stated. If it be granted that the appellants have been guilty of a partial breach of performance, it is nowhere intimated that any damage has been inflicted on the appellee, and the facts stated do not warrant the assumption. Even though it be true that at the date named only a small portion of the land had been cleared, it by no means follows that the entire contract may not be subsequently complied with before the date of its

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Statement of the case.

termination. Nor does the bill of complaint aver that the appellee, if damaged, would not be able to obtain adequate redress for any damage which may have been inflicted upon him. The bill of complaint does not show appellants' inability to perform the contract, it does not aver that they will not perform the contract, it does not show that they are not able to respond in damages. We do not think that the facts of this case warrant a court of equity in decreeing a rescission.

The judgment in the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

GULF & SHIP ISLAND RAILROAD COMPANY *v.* BUSTER NELSON.

TRESPASS. *Damages. Sum demanded. Instruction not to exceed.*

It is not erroneous in an action of trespass for damages for the court to instruct the jury at plaintiff's request that they cannot award greater damages than the sum demanded in the declaration.

FROM the circuit court of, first district, Hinds county.

HON. ROBERT POWELL, Judge.

Nelson, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment for $500 in plaintiff's favor, the defendant appealed to the supreme court.

On the trial plaintiff testified that he was kicked off a passenger train running about thirty-five miles an hour by the porter of the train, and was badly injured thereby. Defendant's

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Brief for appellant.

testimony tended to show that plaintiff was stealing a ride on the train, and when discovered he attempted to get off, fell and injured himself. Only one instruction was given for plaintiff, which was as follows: "If the jury believe from the evidence that the porter of defendant, on the train in question, pushed, forced or threw Buster Nelson from the train, and by his fall from the train, so caused, the plaintiff was injured as set out in the declaration, then the jury should find for the plaintiff, and assess his damages in such sum as they may believe from the evidence he has been damaged, not to exceed the sum of five thousand dollars; and this, too, whether or not they may believe from the evidence plaintiff had a ticket on said train and trip."

McWillie & Thompson, for appellant.

The instruction for the plaintiff is erroneous. It is erroneous in that it fixes $5,000, the sum demanded in the declaration, as the maximum of recovery. This was an intimation to the jury that the finding of such a sum would not be excessive. We know this form of instruction is quite common, and we know, too, that as an abstract proposition it is true, but nevertheless it should not have been given, and never should be given. Suppose the declaration had demanded $10,000,000; one sum is as easily demanded as another, and suppose the instruction had named $10,000,000 instead of $5,000, would it not be absurd? The instruction practically informed the jury that the court would maintain a verdict for $5,000, and of course such an announcement would have the effect of increasing the finding. Can you not see very well the influence the instruction would have on the minds of the jurors inclined to think a small sum proper? The answer to the suggestion of a small sum is patent, and it would be something like this, "$100 or $150 would be ridiculous since the judge said we may find $5,000. He must have meant our finding to be large."

There never was a defendant in an action of tort, or an attor-

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Brief for appellee.

ney who defended one, who did not feel the force of such an instruction as the one we are considering. It is unfair, and, we submit, is erroneous. We do not find authority on the subject, although we have not made an extended search, and do not find that the practice of asking instructions so concluding prevails outside of this state. The practice here ought to be condemned. The statement of the proposition, an abstract one, that the plaintiff cannot recover more than is demanded in the declaration, cannot be justified on the idea that the jury are liable to award greater damages than are demanded. If such were the case, the defendant might properly ask for such an instruction, but experience shows that there is no need for the giving of them at all. We doubt whether the entire realm of litigation will disclose a case in which a defendant asked such an instruction. The plaintiff's attorneys do not ask it for fear too much will be awarded. Such instructions are asked by plaintiffs not because they fear too great a finding in their favor, but because they know the effect of the instruction on the jury in increasing findings in their favor. This is the practical working, the facts behind all of them. Your honors must feel and know this, and the very purpose for which such an instruction is asked by plaintiffs condemns it. It is manifest that the entire bar sees and recognizes the force of the instructions so concluding. All defendants' attorneys know and feel that they do their clients injustice, and all plaintiffs' attorneys ask them for no other reason than because they know that their tendency is to increase the amount of findings.

Harper & Potter, for appellee.

The one instruction asked by appellee is not erroneous; the whole case was one of fact, and that was resolved in plaintiff's favor. The verdict is too small, but of this appellant cannot complain.

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Statement of the case.

CALHOON, J., delivered the opinion of the court.

It is overnervousness to see danger to the defendant in an instruction to the jury, in a personal injury case, that if they found for the plaintiff, they might assess such damages as they believed from the evidence he suffered, not to exceed the amount claimed in his declaration. There was no error in giving the instruction.

Affirmed.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. FRANK P. SMITH.

1. DAMAGES. *Verdicts. Whims of jurors. Instruction.*

Verdicts should be based on the facts of the case, not upon the whims or wishes, likes or dislikes, of the jurors; and an instruction authorizing the jury, if they find for plaintiff, to award such damages "as the jury shall see fit to assess" is erroneous.

2. SAME. *Instructions construed together.*

An instruction limiting the jury, if they find for plaintiff, in assessing damages to a consideration of the instructions given for the plaintiff, ignoring an instruction on the subject given for the defendant, is erroneous, since all the instructions on the subject should be considered and construed together.

3. SAME. *Punitive damages.*

It is not error to refuse plaintiff an instruction authorizing the jury to award punitive damages when such damages would not be justified under any view of the facts of the case.

FROM the circuit court of Yazoo county.

HON. ROBERT POWELL, Judge.

Smith, appellee and cross-appellant, was plaintiff in the court below; the railroad company, appellant and cross-appellee, was

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Brief for appellee and cross-appellant.

defendant there. From a judgment for $250 in plaintiff's favor the defendant appealed to the supreme court, and the plaintiff prosecuted a cross-appeal. A statement of the facts is unnecessary to an understanding of the opinion.

Mayes & Longstreet and *J. M. Dickinson,* for appellant and cross-appellee.

There is an instruction given for the defendant informing the jury that they should not find exemplary damages, yet plaintiff's instruction does not tell the jury that they may consider any of the instructions of the defendant, but informs them that they may find such damages as "they shall see fit" to assess under the instructions given for the plaintiff.

This instruction restricted the jury to the instructions given for plaintiff in order to ascertain the rule and measure of damages, and it warranted them, erroneously, in disregarding all the instructions for the defendant.

The action of the lower court in holding that the case was not one which would warrant punitive damages, was manifestly correct. There was no insult, oppression, no wanton conduct of any sort on the part of the conductor toward the passenger.

Passengers are bound to take notice of reasonable rules and regulations of the railroad company, and employes of the company are constrained to operate their trains in accordance with these rules.

Henry & Barbour, for appellee and cross-appellant.

The law is well settled that where by negligence of the common carrier a passenger is carried past his station, and a walk is necessitated, that the act of the carrier is the proximate cause of the resulting damage, provided the passenger has acted prudently in undertaking such a walk, and it is, except in unusual cases, a question for the jury, with proper instructions, to decide. *Mask* v. *Railroad Co.*, 64 Miss., 744; *Higgins* v. *Railroad Co.*, 64 Miss., 80; *Railroad Co.* v. *Aden,* 77 Miss., 386.

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Opinion of the court.

The only ground upon which we urge a reversal on cross-appeal is the giving of the first instruction for the defendant, and the refusal of the seventh instruction asked by the plaintiff. By these instructions the question of punitive damages was not permitted to go to the jury. This was error, we admit.

In this case there is not shown any momentary forgetfulness, or any mere carelessness or inattention caused by rush of passengers, or attention to other duties, as was shown in the *Scurr Case,* 59 Miss. Nor is there in this case, as will be found in the Scurr case and the *Thompson Case,* 50 Miss., any courteous conduct on the part of the conductor. Nor do we find here any "chapter of accidents," as the learned counsel for appellant styled the occurrences in *Railroad Co.* v. *Faust,* 32 So. Rep., 9. In this case it affirmatively appears that the conductor performed no single one of his duties to his passenger on the night in question.

TRULY, J., delivered the opinion of the court.

The first instruction for plaintiff is fatally erroneous. By it the jury was told that, if they believed the facts therein stated, "then the defendant is liable to plaintiff in damages in such sum as the jury shall see fit to assess under the instructions of the court as herein given for plaintiff." This is not the law. Verdicts must be based upon the facts of the case, not upon the whims or wishes, the likes or dislikes, of the members of the jury. A verdict should be, not what the "jury sees fit to assess," but according to the very rights of the parties as shown by the evidence. A further vice in this instruction is that it restricts the jury in their assessing of damages to a consideration of the instructions "given for the plaintiff." This is error in any state of case, but particularly where, as in this case, the instructions for plaintiff fail to cover the question of nominal damages, upon which the third instruction for the defendant is based. The instructions for plaintiff and defendant should always be construed together, and, when so considered,

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Statement of the case.

should correctly announce the law, and constitute one harmonious whole.

The refusal of seventh instruction for plaintiff was correct. The facts disclosed in no view authorized the infliction of punitive damages.

The case is affirmed on cross-appeal, and on direct appeal reversed and remanded.

MERRITT WILLIAMS v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

HUSBAND AND WIFE. *Code* 1892, § 2294. *Transfers of property. Third persons.*

A husband who manages his wife's farm, under a verbal understanding with her that he is to own the crops, is not the owner of cotton produced thereon and cannot maintain a suit for its negligent destruction by a third person, under Code 1892, § 2294, providing that a transfer of property between husband and wife shall not be valid as against third parties, unless it be in writing and filed for record, and that possession of the property shall not be equivalent to filing the writing for record.

FROM the circuit court of Washington county.

HON. A. MCC. KIMBROUGH, Chancellor.

Williams, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there.

The suit was for damages in the sum of $1,362.90 for cotton burned by the defendant. After all the evidence had been introduced defendant moved to exclude it, and for a peremptory instruction for defendant, on the ground that it was shown by the plaintiff's evidence that the cotton was raised on his wife's farm, and that there was no written transfer of it acknowledged

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Brief for appellant.

and filed for record, as required by section 2294 of the Code of 1892, and that the cotton did not belong to plaintiff, but to his wife. The opinion of the court gives the evidence on this point. The motion was sustained, and there were verdict and judgment for defendant. Plaintiff appealed to the supreme court.

The code section involved is as follows:

"2294 (1178). *What necessary to validity of conveyance.*—A transfer or conveyance of goods and chattels or lands between husband and wife shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record."

Thomas & Rose, for appellant.

The first enactment in our state declaring the invalidity of transfers between husband and wife as against third persons, unless clothed with certain formalities and made public by record, is found in section 1178, Code of 1880. The same section, with some slight verbal changes, is incorporated into the Code of 1892 as section 2294. Prior to the adoption of the Code of 1880, a mischief existed which needed a remedy. What was the mischief? It was the facility with which fraud could be practiced by pretended transfers of property between husband and wife and the difficulty in detecting it. *Gregory* v. *Dodds,* 60 Miss., 552. The fraud could only be perpetrated on creditors or purchasers, or those who had rights of some kind against the husband or wife, or against the property of one of them.

In *Heny* v. *Dillard,* 68 Miss., 536, the facts show the wife's purchase of a mare with the proceeds of a bale of cotton given her by her husband. Creditors of the husband attacked the right of the wife upon the ground that there had been no trans-

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fer of the cotton as required by section 1178 of the Code of 1880, and that she had no better right to property gotten in exchange than that derived by an invalid gift from her husband. The court disposed of the case by saying that the facts, fairly considered, put the rights of the appellee (the wife) to the property in suit wholly outside of the rule established by section 1178. We cite this case to show the recognition by the court in construing this statute that there may be cases in which a third person cannot attack a transfer good between the parties, and that "any third person does not mean under all circumstances every third person."

In *Underwood* v. *Ainsworth,* 72 Miss., 328, the purpose of the statute is decleared to be to "invalidate transfers and conveyances between husband and wife of property which is claimed by creditors or others to be that of the spouse who, but for the transfer of the conveyance, would be owner." The purpose and design of the statute could not be more clearly set forth.

"It is familiar learning that, in the construction of statutes, courts chiefly desire to reach and know the real intention of the framers of the law, and, reaching and knowing it, then to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may beyond or within, wider or narrower than, the mere letter of the enactment." *Board of Education* v. *Railroad Co.,* 72 Miss., 239.

"The reason of the law should prevail over its letter." *United States* v. *Kirby,* 74 U. S. Wall., 482.

A bare tort feasor cannot set up in defense the title of a third person between whom and himself there is no privity of connection. *Omaha Grant Smelting R. R. Co.* v. *Tabor* (Colo.), 5 L. R. A., 242.

Appellant was in lawful possession of the property with the consent of his wife, was the bailee thereof, and had such special property therein as entitled him to maintain an action in his

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Brief for appellee.

own name for its loss or injury, and this although he might not be liable to the owner. He could have sued in his own name in trover. *Johnson* v. *Gulf, etc., R. Co.*, 34 So. Rep., 257, *Ante*, 452. And his possession alone was sufficient to support an action of trespass or trover. *Harris* v. *Newman*, 5 How. (Miss.), 654. The rule applies both to real estate and personalty. *Railroad Co.* v. *Currie*, 62 Miss., 506.

In the Am. & Eng. Enc., Vol. 3, p. 761, 2d ed., the rule is stated to be "as respects third persons the bailee has a special property in the thing bailed, sufficient to protect it against wrong-doers."

This rule is approved by our courts in *Baggett* v. *McCormack*, 73 Miss., 554.

Percy & Campbell, for appellee.

Section 2294 of the Code of 1892, as amended by chapter 90 of the laws of 1900, makes a transfer between husband and wife invalid as against any third person, unless the transfer be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be. Section 1512, of the Code of 1892, provides that the word "person," when used in any statute, shall apply to artificial as well as natural persons. The expression in the statute as against "any third person" is broad and comprehensive, including any person, natural or artificial, other than the husband and wife, and applies to tort feasors, as well as persons dealing with the husband or wife, or occupying a contractual relation with them. The only way to make the statute effective is to enforce it exactly as written. *Gregory* v. *Dodds*, 60 Miss., 549; *Montgomery* v. *Scott*, 61 Miss., 409.

The appellee is a "third person" within the statute. The statute is a rule of evidence, and, by virtue of it, neither the husband nor wife can prove, as against "any third person," a

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Brief for appellee.

transfer of goods and chattels from one to the other, except as provided by the statute.

Section 2293, of the Code of 1892, makes it unlawful for the husband to carry on business in his own name, or on his own account, with any of his wife's property, as to all persons "dealing" with him without notice; while section 2294 makes transfers between husband and wife void as against "any third person." The former section affects only persons occupying some contractual relation with the husband or wife, while the latter applies in favor of "any third person," even a tort feasor. Under the former section "notice" of the condition of things, on the part of the person dealing with the husband binds him; while under the latter, "notice" amounts to nothing; and that is because the latter section is a rule of evidence to be applied in favor of all persons, other than the husband or wife.

The record fails to show that appellant was bailee of the cotton in such sense as to entitle him to maintain this suit. He does not sue as bailee, but as owner, and he sought to show by his testimony that he was owner. He made no pretense of founding his right on the fact that he was bailee. That a bailee may maintain a suit against a wrong-doer, for injury to property in his possession, is well settled in this state and elsewhere, but to justify such suit the property must have been in his possession at the time that it was injured. The cotton in controversy was not in appellant's possession, but when destroyed was lying on the platform belonging to his wife, and it was in her possession. Just as well say that the husband could maintain a suit for trespass upon his wife's land, because, living with his wife, he was in possession of her lands. The fact that appellant was living with his wife on her plantation, where the cotton in controversy was grown, and was lying at the time of its destruction, could not in law be construed as giving him possession of the cotton. Having been grown on his wife's land and ginned and baled at her gin, and being on her platform, the cotton was in

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Brief for appellee.

her possession and, being in her possession at the time it was destroyed and not in appellant's possession, he was not entitled to maintain this suit as bailee, and he should not be allowed to do so.

Mayes & Longstreet and *J. M. Dickinson,* on same side.

The cotton was at one time unquestionably the property of Mrs. Williams, the wife. It was grown on her plantation, made by her tenants, with her farming equipment, ginned in the gin on the wife's land, and stored on the platform on the wife's land. The plaintiff sued—one of the items claimed—for the recovery of $15 damages to the platform, and he had under the proof no right to sue for damages to the platform or gin or cotton on the platform.

When did the title to this cotton ever vest in plaintiff? When did the wife ever divest herself of her legal rights in and to it, and by what sort of conveyance? The plaintiff fixes no time when, nor terms by which, any transfer was ever made to him. He testifies, "I have always shipped it as mine," but this appropriation did not operate to transfer the title. The vague, undefined "understanding" between husband and wife was ineffectual. There must have been a specific agreement or transfer in writing signed, acknowledged and filed for record. Section 2294, Code 1892; *Walker* v. *Marseilles,* 70 Miss., 283; *Lea* v. *Bank,* 72 Miss., 317, 328; *Paine* v. *Sykes,* 73 Miss., 353.

Plaintiff has not framed his pleadings, nor stated his right in such form as to entitle him to recover as bailee, he has sued as absolute owner, and in this court for the first time does he appear claiming as bailee.

In all bailments the pleadings or proof must show some contractual obligation resting on the bailee to account to the bailor, either for the property itself or for its proceeds, some retention of title or interest in the bailor. The testimony and theory of plaintiff is, that the wife has parted with all right or

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Opinion of the court.

interest in the cotton, and has transferred it to him; that it is the property of plaintiff, because his wife consents that he may appropriate it; that he is sole owner, with no responsibility to account in any wise to the wife resting upon him.

The statute, section 2294, was not for the purpose, primarily, of aiding in the collection of debts, nor were the creditors of chief concern; it was enacted in the interest of good morals, and from public policy, it diminishes dishonesty and fraud, and to prevent the close and sacred relation of husband and wife from being abused, and from being constantly converted into a means of oppression and wrong.

Section 2294 declares no restriction of right to object to such transfers to persons having business transactions with husband or wife, it declares that such transfer of property as is asserted in this case shall be void "as against any third person unless the transfer or conveyance be in writing," etc. It is a rule of evidence.

Argued orally by *A. J. Rose,* for appellant, and by *James C. Longstreet,* for appellee.

CALHOON, J., delivered the opinion of the court.

The evidence on the question of the ownership of this cotton and its possession is as follows: "Q. Mr. Williams, you spoke in your examination about the cotton being your cotton. Was it yours or your wife's? A. Mine. Q. Where was it raised? A. At home. Q. Who owns the place? A. My wife. Q. And this cotton was raised there? A. Yes, sir. It was shipped in my name. Q. How came the cotton yours, if the place was hers? A. I have always shipped it as mine. Q. I know. It had not been shipped yet, and your wife owns the property? A. But not the crop. Q. How do you hold that property? Is there any contract between you and your wife? A. No written contract, but an understanding. Q. So the land is hers that produced this cotton, and there is simply an understanding

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between you and her that the crop is yours, and no contract on record? A. No, sir; none on record. Q. Your only claim to this cotton results from an understanding between you and your wife? A. Yes, sir. I furnish the capital to raise it. Q. Then there was no contract between you and her, oral or in writing, but simply an understanding. A. Yes, sir; simply an understanding. Q. Mr. Campbell asked you about your property. That cotton was in your custody and in your control by consent of your wife? You were then owner of that cotton? A. Yes, sir; it was shipped in my name. Q. No one had a claim to that cotton? A. No one. Q. Your wife makes no claim to that cotton? A. No, sir. (Objected to. Objection sustained.) Q. In whose possession was that cotton? A. Mine. Q. Did any one have a right to that cotton? (Objected to. Objection sustained.) Q. Mr. Williams, was that platform and gin on your wife's land? A. Yes, sir. Q. Who made the cotton? A. I attended to it, and furnished the capital for it." From this we deduce the conclusion that the plaintiff was certainly not in legal possession of the cotton as owner, bailee, or otherwise. It had not been shipped. It was grown on his wife's land, ginned at her gin, and placed for shipment on a platform belonging to her. The use of the ambiguous word "understanding" does not sufficiently show a meeting of the minds in a contract or agreement intended to be obligatory on both husband and wife, so as to make a judgment pleadable as an adjudication against her. From the context and the circumstances the witness perhaps used it to express merely his own confidence in the purpose of his wife without actual agreement or contract. "It falls short of alleging a distinct express contract." *Black* v. *City,* 19 S. C., 419, 45 Am. Rep., 785.

Affirmed.

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Brief for appellant.

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FRANK THAMES v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Intent to wound. Intent to kill. Intent to murder.*

An intent to wound is not an intent to murder, nor is an intent to kill necessarily an intent to murder.

2. SAME. *Instruction. Assault with intent to murder.*

An instruction for the state in a prosecution for an assault with intent to kill and murder is fatally erroneous, if it assume an intent to wound, or an intent to kill to be the same as an intent to murder.

FROM the circuit court of Newton county.

HON. JOHN R. ENOCHS, Judge.

Thames, appellant, was indicted, tried, and convicted of an assault and battery with intent to kill and murder one Solomon Gardner, and appealed to the supreme court.

The facts may be inferred from the opinion of the court and the instruction quoted therein.

J. R. Byrd and *Thomas Keith,* for appellant.

The fourth instruction given for the state in which the court told the jury, that if they believed that the defendant shot at Gardner with intent to wound and kill him, they should find defendant guilty as charged. The court, by using the word "wound," told the jury to find the defendant guilty as charged if they believed he intended to commit simply an assault and battery or if he intended to commit murder. The defendant is charged with an assault with intent to kill and murder, and surely the jury should not have been told to find him guilty as charged if they believed he intended to commit simply an assault and battery.

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Opinion of the court.

William Williams, attorney general, for appellee.

The fourth instruction given for the state in which the word "wound" is used is a correct enunciation of the law. Code 1892, § 967.

"Every person who shall be convicted of shooting at another . . . willfully . . . is guilty of assault and battery with intent to kill, and shall be imprisoned in the penitentiary not more than ten years, or shall be punished by a fine of not more than $1,000, or by imprisonment in the county jail not more than one year, or both.

By a careful reading of the section of the code above cited, taking into consideration the punctuation, it will be seen that the legislature intended that one who willfully shoots at another is guilty of assault and battery with intent to kill and murder. It would be absurd to say that one might shoot at another while fleeing, and, in all probability kill, and then offer as a defense that his intention was simply to wound and not kill him. The word "wound" was not improperly used in the instruction. If it was improper to use the word in the instruction, it will be seen from the record that the verdict was manifestly right, and if so, it will not be disturbed because of an erroneous instruction. *Vance* v. *State*, 62 Miss., 137.

WHITFIELD, C. J., delivered the opinion of the court.

This was a charge of assault and battery with intent to kill and murder. The court gave, among others, the following charge for the state:

"No. 4. The court charges the jury for the state that if from all the testimony in the case they believe beyond a reasonable doubt that the defendant chased Sol. Gardner with a drawn pistol and in firing distance of said Gardner, and that the defendant further fired the said pistol in the direction of said Gardner while he was so being chased by said defendant, with intent to wound or kill him, the said Gardner, then the defendant is guilty as charged, and the jury should so find."

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Syllabus.

It will be seen that the only intent required by this charge was one to wound or kill. Neither intent to wound, nor merely intent to kill, would necessarily constitute this offense. One might intend to wound without meaning to kill, and one might intend to kill in necessary self-defense. It is essential that the intent should be to murder. The charge is fatally erroneous.

Reversed and remanded.

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MAURICE WINNER ET AL. v. EDWARD C. WILLIAMS.

1. APPEAL. *Justice's Court. Dismissal in Circuit Court. Findings of fact. Supreme Court.*

   The supreme court will not disturb the findings of a circuit judge on disputed questions of fact on the hearing of a motion to dismiss an appeal from a justice's court.

2. SAME. *Appeal bond. Approval of Justice. Time.*

   The fact that a justice of the peace fails to indorse his approval on an appeal bond within five days after the rendition of judgment will not affect the validity of the appeal if his approval subsequently indorsed thereon show that the bond was filed within the five days.

3. SAME. *Tender of bond.*

   When an appeal bond has been tendered to a justice of the peace, the names of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing, which he cannot afterwards invalidate.

4. FIXTURES. *Tenant. Agreement with landlord.*

   Where the tenant of demised premises subject to a trust deed has replaced an old boiler with a new one in order to enable him to conduct the business for which the property was leased and

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Statement of the case.

by agreement with his landlord he was to have the right to remove the same at pleasure, the old boiler still remaining on the premises unused, his title to the new boiler is not affected by a sale of the premises under the trust deed and the conveyance of the same to a purchaser by a description which does not include the new boiler, although such boiler was connected with the boiler house by steam pipes and other necessary attachments.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

This was an action of replevin for a boiler and originated in the court of a justice of the peace, the appellee, Williams, being plaintiff, and the appellants, Winner and others, doing business under the name of "Winner & Meyer," defendants. From a judgment in favor of defendants plaintiff appealed to the circuit court, where the defendants moved to dismiss the appeal because the appeal bond was not filed within five days after the judgment was rendered by the justice of the peace. On the trial of this motion the plaintiff, Williams, testified that he gave the appeal bond to the constable of the court on the third day after the judgment was rendered, who promised to deliver it to the justice of the peace. The constable testified that he went into the justice of the peace's office, and offered the bond to him, and read the names of the bondsmen to him, and he (the justice of the peace) said: "That is all right, but I am busy now. Hand it to me when I get through;" that he did not hand the bond to the justice of the peace, but that officer said it was all right; that he kept the bond several days, and gave it to the justice of the peace, who then marked it filed as of the day he offered it to him. The justice of the peace testified that the constable did come into his office and told him he had the appeal bond in the case, and the witness told him to deliver it some other time, as he was busy then; this was within the five days allowed to make the appeal; but nothing was said as to who the sureties were, and he did not know who they were until

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Brief for appellee.

the bond was handed to him a good many days after the five days had expired. The court overruled the motion to dismiss the appeal. The facts, as presented on the trial of the merits of the case, are fully stated in the opinion of the court.

Etheridge & McBeath, for apppellants.

1. The appeal was invalid under the facts shown. 1 Enc. Pl. & Pr., 977, 989. *Kramer* v. *Holster,* 55 Miss., 243; 8 Enc. Pl. & Pr., 924; *Hamilton* v. *Beardsley,* 51 Ill., 478.

2. The boiler was a fixture, had become a part of the realty, and clearly passed to the purchaser at the sale under the trust deed. 13 Am. & Eng. Enc. L. (2d ed.), 613, 628, 633; *Simpson Brick Press Co.* v. *Warnerly,* 61 Ill. App., 460; *Winslow* v. *Merchants Ins. Co.,* 38 Am. Dec., 368; *Green* v. *Phillips,* 26 Gratt. (Va.), 752; *Taylor* v. *Collins,* 51 Wis., 123; *Watris* v. *Nat. Bank Cambridge,* 124 Mass., 575; *McConnell* v. *Blood,* 123 Mass., 47; *Tate* v. *Blackburne,* 48 Miss., 9; *Range Co.* v. *Allen,* 7 South. Rep., 499; *Phoenix Iron Works* v. *N. Y. Security Co.,* 83 Fed. Rep., 757.

3. The plaintiff had only a half interest in the boiler, and replevin does not lie as between joint owners. *Holton* v. *Beirne,* 40 Miss., 391.

R. F. Cochran, for appellee.

1. There was no failure to tender a sufficient appeal bond, and there was in legal contemplation a filing and approval by the justice within the statutory period. His omission to properly indorse the bond until a subsequent day is immaterial. *Robinson* v. *Mhoon,* 68 Miss., 712, 1 Enc. Pl. & Pr., 990.

2. The boiler did not become a part of the realty in view of the circumstances under which it was placed on the demised premises by the tenant. *Weathersby* v. *Sleeper,* 42 Miss., 732; *Polle* v. *Rouse,* 73 Ill., 713.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

The finding of the circuit judge on the disputed question of fact on the hearing of the motion to dismiss the appeal from the justice of the peace court will not be disturbed. The approval of the justice of the peace indorsed on the appeal bond showed that it had been filed in due time. The fact that he did not write his approval on the paper until after the expiration of the five days allotted by law does not alter the legal status. If, as the circuit judge decided, the bond was tendered the justice of the peace in due time, the names of its sureties read to him, their sufficiency unquestioned, and his approval of the bond stated, this was a legal filing, which he could not afterwards invalidate. It was the duty of the circuit court to see that when the law has been substantially complied with the rights of litigants are not prejudiced by technical errors of the inferior court, whether accidentally or intentionally committed. *Robinson* v. *Mhoon,* 68 Miss., 712, 9 South., 887; *Swain* v. *Gilder,* 61 Miss., 667.

Upon the merits but one question worthy of consideration is presented by the record: Can the vendee of the tenant, under the facts here, recover the boiler in question from the purchaser at trustee sale of the landlord's title? In our opinion, a statement of the facts is an answer to the inquiry. Appellants claim title under foreclosure of a trust deed executed in 1897. After the execution of the trust deed the boiler conveyed thereby, described as an "Erie Pennsylvania" boiler, became worn out and worthless. The landlord refused to purchase a new boiler, which was necessary to the prosecution of the business conducted on the leased premises, whereupon the tenant procured the boiler now in question, described as a "Cleveland and Hardwick Fire Box Boiler," and attached it to the machinery used in the slaughter house, disconnecting the old boiler, but leaving it on the premises. This placing of the boiler was with full knowledge of the landlord, and under a distinct and undenied

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Opinion of the court.

agreement that the tenant could move it at pleasure. Appellants foreclosed their trust deed while the boiler was on the premises, purchased at the sale, and procured a deed from the trustee conveying the property described in the trust deed, which description does not include the boiler in question. Consequently appellants acquired no title by virtue of said sale. Appellee bought from the tenant, demanded possession of appellants, and, this being refused, instituted this suit.

Appellants contend that, as the boiler was annexed to the other machinery composing the plant in the slaughter house, and was by steam pipes and other necessary attachments connected to the boiler house, it, by operation of law, became a fixture and part of the realty, and as such passed with the land. The doctrine contended for has no application. We recognize and adhere to the general doctrine of fixtures, which is well established and understood, but we also adhere to the exception in favor of tenants and of trades and manufactures, which is as well established and defined. This case is controled by the case of *McNath* v. *Levy*, 74 Miss., 450, 21 South., 9, 523. The question of fact as to the identity of the boiler was fairly submitted to the jury, and the law was correctly announced in the instructions of the court.

Affirmed.

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Statement of the case.

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MORRIS ROSENSTOCK, EXR., v. MISSISSIPPI HOME INSURANCE COMPANY.

1. FIRE INSURANCE. *Ownership. Vendor and vendee.*
A vendor who admits his vendee into possession of real estate and receives from him a large payment on the purchase money, is not the sole and unconditional owner within the terms of a fire insurance policy stipulating that it shall be void if the insured is not such owner, though he retains the legal title under an agreement to convey it on the full payment of the purchase money.

2. SAME. *Time of ownership. Issuance of policy.*
The condition of a policy of fire insurance that the same shall be void if the insured is not the sole and unconditional owner of the property relates to ownership at the issuance of the policy.

3. SAME. *Estate as beneficiary. Issuance without application.*
Where a fire insurance policy stipulates that the same shall be void if the insured is not the sole and unconditional owner of the property, and at the issuance of the policy the vendee of the decedent whose estate is the beneficiary had been admitted into possession and made a large payment on the purchase money, the policy is void, although no application had been made for the same and the decedent had taken out policies on the property for other years in his lifetime.

FROM the circuit court of Washington county.

HON. A. MCC. KIMBROUGH, Judge.

This was an action brought by the appellant, Morris Rosenstock, executor of M. Rosenstock, deceased, against the appellee, the Mississippi Home Insurance Company, on its policy of insurance against fire, dated September 3, 1903, in favor of the "estate of M. Rosenberg," containing a stipulation that the same should be void "if the insured is (were) not the sole and unconditional owner of the property." The property, a storehouse, was totally destroyed by fire on December 28, 1903, and this suit was thereafter instituted on the policy by the

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Statement of the case.

executor. The defendant insurance company pleaded in avoidance of the policy that (by reason of the contract hereinafter set out) neither the decedent M. Rosenberg nor his estate was the sole and unconditional owner of the property when the contract of insurance was entered into, upon which plea issue was joined. On December 26, 1900, the decedent had entered into the following contract of sale of the storehouse in question:

"For and in consideration of the sum of two hundred dollars cash in hand paid me by Ben Tee, and for the further consideration of thirty-two notes, $25 each, dated Jan. 1st, 1901, and due and payable the first of each month until paid, notes bearing interest at the rate of 6 per cent per annum, and making the total consideration of $1,000 (one thousand dollars), I, M. Rosenberg, hereby agree to sell unto said Ben Tee the following property, being in the town of Glen Allan in Washington county, Mississippi, to wit [here giving a description of the lot], with all and singular the appurtenances thereto belonging. It is hereby agreed that when all notes are paid by said Ben Tee said Rosenberg is to give said Tee a deed and title to said storehouse. It is hereby agreed that said sale is subject to the lease of said storehouse now owned and occupied by J. Harber & Co. Given under my hand this 26th day of December, 1900. (Signed) M. Rosenberg."

Ben Tee, the vendee of the decedent, paid $200 in cash to the decedent on this contract and went into possession of the property in June, 1901, and has remained in possession ever since. Afterwards, before the fire, he paid $425 more of the purchase money. The property was originally insured by the decedent and renewals sent to him from year to year during his lifetime. After his death the policy in suit was issued and mailed to his executor. The insurance company was entirely without notice of the existence of the contract of sale and of the possession of the property by Tee under the same until after the fire. No demand was then made on the decedent by the

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Brief for appellant.

insurance company for any information as to the premises, the title thereto or the occupant thereof.

The court below gave a peremptory instruction for the defendant, and from the judgment in its favor the plaintiff appealed to the supreme court.

William Griffin, for appellant.

The policy was payable to the "estate of M. Rosenberg" irrespective of title, interest, or occupancy. All persons interested in the estate undoubtedly have insurable interest in the property of the estate until final distribution. The executor is merely the medium to collect the policy for the benefit of the estate. It is not pretended that the executor made any representations whatsoever to appellee; on the contrary, it is expressly agreed "that after Rosenberg's death the policy in suit was issued as therein shown, and mailed to Morris Rosenberg, and this is all that occurred in connection with the issuance of the policy;" also that no demand was ever made on the executor by appellee for any information as to the title or occupancy of the premises.

So far as the evidence discloses, the executor may not have known of the existence of the policy until it was received by him, through the mail, and he was called upon to pay the premium, which he did.

The facts that Ben Tee was in possession of the premises at the time of the death of Rosenberg and the expiration of the old policies, and that the contract sued upon was executed after the death of Rosenberg, and in any event looked to the future and not to the past, and was a new contract in every particular, were disregarded.

Under the agreed facts in this cause, the appellee, when it executed the policy in suit and received a premium therefor, expressly waived all conditions as to the "title to the property" and the "sole and unconditional ownership thereof" which may

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Brief for appellant.

have existed anterior to its execution, and this seems to be well settled by the text writers and decisions.

"It may be stated as a general rule that if there is no written application, and the company issues a policy without one, or without any written request, or without any representation, oral or written, the policy may be assumed to have been written upon the knowledge of the company or its agent, and in such case the company cannot, after a loss, set up that the interest or the title of the assured is other than that evidenced by the policy." 1 Joyce on Insurance, sec. 496. See also 1 Wood on Insurance, p. 409; *Morrison's Admr.* v. *Insurance Co.*, 59 Am. Dec., 299, and notes; *Armenia Ins. Co.* v. *Paul*, 36 Am. Rep., 676.

"A condition in a policy of insurance that the policy shall be void unless consent in writing is indorsed thereon by the company, if the assured is not the sole and unconditional owner of the property, relates only to changes arising after the execution and acceptance of the policy, does not apply to an existing state or condition of the property at the time when the policy was issued." *Hall* v. *Niagara Fire Ins. Co.*, 32 Am. St. Rep., 497; *Peet* v. *Dakota F. & M. Ins. Co.*, 47 N. W., 532.

"A fire insurance policy which provides that it shall be void if the interest of the assured be other than unconditional and sole ownership, issued on a dwelling to one who holds the land under contract only, is not void where he made no written application and no representations as to the ownership." *Knop* v. *National Fire Ins. Co.*, 59 N. W. Rep., 653; 16 Am. & Eng. Enc. Law, p. 936, Par. C. and note 1, p. 937.

The case of the *Georgia Home Ins. Co.* v. *Holmes*, 75 Miss., 390, ought to be decisive of the question.

But under the facts of this case, even though the loss had occurred in the lifetime of Rosenberg, or under any of the policies in force at his death, the contract of sale would not have worked a forfeiture, either as an alienation of the prop-

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Brief for appellee.

erty or its sole and unconditional ownership, under those decisions which are said to be the sounder doctrine, in the light of modern jurisprudence, and which are certainly more in consonance with justice, when the nature of the contract is taken into consideration.

"An executory contract for the sale of the insured property is not a 'sale,' 'transfer,' 'alienation,' or 'change of title' so as to avoid the policy so long as there has been no conveyance or delivery under the contract. While the purchase money is unpaid, and the property is in the possession of the insured, or the title is in him, such a contract is similar to any other incomplete transfer in its effect upon the conditions of the policy."

"If the vendee takes possession under the contract, and makes payments, acquiring an equitable title, it has been held that there is a change of title within the meaning of the condition; but this is contrary to the general rule." 13 Am. & Eng. Enc. Law, pp. 247, 248, and cases cited, especially *Smith v. Phoenix Ins. Co.*, 25 Am. St. Rep., 191.

The execution of the policy in this suit was entirely in the hands of the appellee. It selected the "estate of M. Rosenberg" as the beneficiary, and necessarily agreed to pay all persons interested in said estate the full amount of the policy, in event of a total loss, regardless of the conditions contained in the policy, now relied upon to defeat it. It accepted the policy subject to the law governing estates, and contracted to indemnify said estate for the consideration named in the policy in the event of loss. It expressly waived the conditions relied upon in so making the contract. It expressly recognized the various interests arising under the administration of an estate, and agreed to protect these interests.

Thomas & Rose, for appellee.*

On the 3d day of September, 1902, appellee issued its policy

*The briefs of appellee's counsel are published in full by order of the court.

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Brief for appellee.

of insurance to the "estate of M. Rosenberg," insuring a storehouse for a term of one year. On December 26, 1900, M. Rosenberg executed a contract of sale for the storehouse, and the lot on which it stood, to Ben Tee, for $1,000, a copy of the contract being set out in the agreed statement of facts. The purchaser paid $200 in cash, as provided by the contract of sale, went into possession under the contract in June, 1901, and continued in possession under the contract of sale until the destruction of the store, and is still in possession under the contract. The contract of insurance provides, among other things, that, if the insured is not the sole and unconditional owner, the policy shall be void. Under the agreed statement of facts, the "issues are raised by the pleadings;" that no notice of any kind was given appellee of the execution of the contract; that it had no notice of any kind of the existence of the contract, or the possession of the property by Ben Tee under the contract, until after the fire that destroyed the property, and soon after the fire, and before suit brought, appellee notified plaintiff that it regarded the policy as void, denied its liability thereunder, and tendered and offered to pay back to plaintiff the premium which had been paid for the policy, which the plaintiff refused to receive.

This brief is directed to the question raised by the plea to the declaration, wherein it is alleged that, under the terms of the policy, it was to be void if the assured were other than the "sole and unconditional" owner, etc. The policy contains conditions against "alienation," "sale," "transfer," and, in addition thereto, the provision making it void if the assured is not the "sole and unconditional owner." This is emphasized because the courts make a broad distinction, and contracts which have been held not invalid as against the prohibition of "alienation," "sale," or "transfer" have been held to be within the prohibition of "sole and unconditional ownership." All of the authorities, with one exception, which we have been able to

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Brief for appellee.

examine, uphold the doctrine that a vendor in a land contract, who has admitted the vendee into possession, is not the sole and unconditional owner, although he retains the legal title. 13 Am. & Eng. Enc. (2d ed.), 235, and note 5; *Hamilton* v. *Ins. Co.,* (Mich.), 57 N. W. 735, 22 L. R. A., 527; *Ins. Co.* v. *Boulden* (Ala.), 11 South., 771; Am. Dig., 1897, p. 2805, sec. 118 (a-e); *Syndicate Ins. Co.* v. *Bohn* (C. C. A.), 65 Fed., 165, 27 L. R. A., 614; 1 May on Ins., p. 601, sec. 287c; Am. Dig. 1897, p. 2815, sec. 118 (a-e); Cent. Dig., vol. 26, p. 1240; Ostrander on Ins. (dd ed.), pp. 269, 270. It is not the vendor, but the vendee, under the contract of sale, in possession, who is the sole and unconditional owner. Ostrander on Fire Ins. (2d ed.), p. 232, sec. 72.

On September 3, 1902, when the policy was issued, and thereafter, Ben Tee was in possession under a valid existing contract of purchase, which he could enforce, and which was enforceable against him. Ben Tee could insure as the unconditional, absolute and sole owner—as the owner in fee simple—while Rosenberg, or his estate, was only the holder of the legal title in trust for Ben Tee, having a lien thereon for such balance as might be due. Rosenberg's interest was not unconditional. It was a conditional ownership, not individual or sole, but fiduciary or dual. The exact question was before the court in *Hamilton* v. *Insurance Co.* (Mich.), 57 N. W., 735, 22 L. R. A., 527; the court deciding that the vendor in the existing contract of the sale has not the "sole and unconditional ownership," and adding that "the point appears too clear to justify elaborate discussion." And in the same case the court says: "We may therefore agree with counsel that a vendee is, by these decisions, an owner, under this clause [the clause of sole and unconditional ownership], though the vendor may hold legal title to insure performance of the contract. And it would seem to logically follow that the vendor is not such owner, and our attention is not called to any case where the vendor has

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Brief for appellee.

been held to be such." The condition is reasonable and valid, and a violation of it will prevent recovery. And a failure to disclose the real state of the title will be fatal, although the insured was not questioned as to that fact. 1 May on Ins. (4th ed.), sec. 287a. The condition relates to ownership when the policy is issued. 28 Cent. Dig., p. 1223, sec. 602, pars, "m," "q." That condition relates to ownership when the policy is issued, and not to changes arising after its execution, as contended by appellant, and that it is a reasonable condition has been directly settled by this court in *L. & L. & G. Ins. Co.* v. *Cochran*, 77 Miss., 348, 26 South., 932, 78 Am. St. Rep., 524. The case of *Peet* v. *Dakota Ins. Co.* (S. D.), 47 N. W., 532, cited by appellant, is not at all in point; and the cases of *Hall* v. *Niagara Fire Ins. Co.* (Mich.), 53 N. W., 727, 18 L. R. A., 135, 32 Am. St. Rep., 497, and *Knop* v. *Insurance Co.* (Mich.), 59 N. W., 653, cited by counsel, were both cases where the action was by the vendee in the contract of sale, the beneficiary owner, not by the vendor.

The policy itself, containing, as it did, the contract that it should be void if the assured was not the sole and unconditional owner, was a pointed inquiry of the assured whether that interest was the sole and unconditional ownership of the property described, and the assured's silence and acceptance of the policy was the answer. The policy itself was notice to the assured that the company deemed the assured's interest that of unconditional ownership; that it assured against loss to that extent only; that it expressly excluded every interest from the insurance, unless the assured immediately notified it that there was a different interest, and procured a written consent thereto. The silent acceptance of the policy by the assured closed the contract, and bound the assured to the agreement tendered by the policy, that every other interest but that of unconditional ownership was excluded from the promised indemnity. This is the language of the court in *Columbian Ins. Co. of Alexan-*

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Brief for appellee.

dria v. *Lawrence,* 2 Pet., 25, 49, 7 L. Ed., 335, 344; *Waller* v. *Northern Assurance Co.* (C. C.), 10 Fed., 232; *Collins* v. *St. Paul Fire & Marine Ins. Co.,* 44 Minn., 440, 46 N. W., 906; *Lasher* v. *St. Joseph Fire & Marine Ins. Co.,* 86 N. Y., 423, 427; *Weed* v. *London & L. F. Ins. Co.,* 116 N. Y., 113, 22 N. E., 229; *Diffenbaugh* v. *Union F. Ins. Co.,* 150 Pa., 270, 24 Atl., 745, 30 Am. St. Rep., 805; *Fuller* v. *Phoenix Ins. Co.,* 61 Iowa, 350, 16 N. W., 273; *Waller* v. *Northern Assur. Co.,* 64 Iowa, 101, 19 N. W., 865; *Mers* v. *Franklin Ins. Co.,* 68 Mo., 127, 132; *McFetridge* v. *Phenix Ins. Co. of Brooklyn,* 84 Wis., 200, 54 N. W., 326; *Henning* v. *Western Assur. Co.,* 77 Iowa, 319, 42 N. W., 308; *Liberty Ins. Co. of New York* v. *Boulden,* 96 Ala., 508, 11 South., 771; *Pelican Ins. Co.* v. *Smith,* 92 Ala., 428, 9 South., 327.

Counsel for appellant discusses at some length what he terms the first policy issued to M. Rosenberg in his lifetime by appellee, but the only issue tried, and the only issues before the lower court were those raised by the pleadings, the agreed statement of facts showing "that the issues are as raised by the pleadings," and the plea alleges that plaintiff was not the sole and unconditional owner, etc., and issue was joined on that plea, so that the question was simply one of law, on the issue joined in this plea and the admitted facts shown by the agreed statement. The view of the court below was that, under the pleadings and admitted facts, the assured did not have that "sole and unconditional ownership" required by the policy, but that the ownership — the beneficial interest — was in Ben Tee, the assured holding the bare naked legal title.

It was urged below, and insisted on by counsel for appellant in his brief, that the defense is purely technical, but this is not correct. The "moral risk" is as carefully scrutinized, if not more so, than the physical one. Appellee may have been quite willing to insure property of M. Rosenberg, or property belong-

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Brief for appellee.

ing to his estate, and unwilling to insure the same property belonging to Ben Tee. And the moral risk is always carefully scrutinized in those states having a valued policy law. The contract is neither unjust, unreasonable, nor unfair. It rests upon sound business policy —"a policy founded in reason and in accord with an enlightened policy; the policy of reducing the moral hazard to which the underwriter is exposed. Moral hazard in assurance is but another name for pecuniary interest in the property to burn."

We respectfully submit that the judgment should be affirmed.

Dabney & McCabe, on the same side.

It is our purpose only to make a few suggestions supplementary to the brief filed by associate counsel.

The property was insured for $750, and that is the amount demanded in this case. The lot and house together had been previously sold by insured's testator for $1,000, evidenced by a contract to make title on the payment of the whole amount of the purchase money. Two hundred dollars of this amount was paid in cash, and $425 of it was subsequently paid before the fire, making $625 of the purchase money actually paid at the time of the loss, leaving a balance of only $375 remaining unpaid. If the plaintiff is allowed to recover in the action, it would seem that he was entitled to recover the whole $750, notwithstanding his interest in the property, including the lot upon which the house stood, which, of course, is not embraced in the policy, is only $375. The courts, we believe, always recognize the justice of the provisions in insurance policies against incumbrances and failure of title, because the provisions are meritorious and are necessary for the protection of the insurance companies against frauds and impositions. It is not pretended that the insurance company had any notice of this contract of sale. If the plaintiff in this case is entitled to recover under the existing conditions, he would have been enti-

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tled to recover had all the purchase money, save the last $25 note, been paid. A bare statement of this case on its face seems to be sufficient to condemn the plaintiff's demand. This court has held in *L. & L. & G. Ins. Co.* v. *Cochran,* 77 Miss., 348, 26 South., 932, 78 Am. St. Rep., 524, that a person holding a half interest in the property would not be entitled to recover, where there was no notice to the insurance company. That being the case, how can it be said that a person owning less than four-tenths of the houses and lot combined, and probably less than one-sixth of the buildings which were destroyed, can recover? The case cited by associate counsel of *Hamilton* v. *Dwelling House Ins. Co.,* 98 Mich., 535, 57 N. W., 735, 22 L. R. A., 527, seems to be exactly in point. See, also, *Barnard* v. *Nat. F. Ins. Co.,* 27 Mo. App., 26; *Harness* v. *Nat. F. Ins. Co.,* 62 Mo. App., 245. See, also, *Rathmell* v. *Aurora F. Ins. Co.,* 38 Wkly. Notes Cas., 356.

Property partly owned by another, or subject to a lien, falls within the terms of the policy. *Ger.-Am. Ins. Co.* v. *Paul* (Ind. T.), 53 S. W., 442. See, also, *Liberty Ins. Co.* v. *Boulden,* 96 Ala., 508, 11 South., 771; *Hubbard* v. *N. B. & M. Ins. Co.,* 57 Mo. App., 1. Suppose it to be said that the proof does not sustain the plea setting up that the plaintiff was not the sole and unconditional owner of the title. Other pleas set up that there was a lien or incumbrance cn the property. The language of the policy is: "Or if the insured is not the unconditional and sole owner of the property; or if there be any lien or incumbrance on the property, either from judgment, attachment, mortgage, deed of trust, vendor's lien, or otherwise, of which notice shall not have been given," etc., the policy shall be thereby avoided. It has been held in this state — what to our minds is manifestly sound — that the relations of vendor and vendee in a contract of sale are those of mortgagee and mortgagor. *Strickland* v. *Kirk,* 51 Miss., 795. Quoting from *Tanner* v. *Hicks,* 4 Smed. & M., 300, it is said: "The retention of

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Opinion of the court.

title by the vendor upon a sale is, in effect, the same thing with conveying a title and taking a security by mortgage." *Id.* Again: "As we have seen, the vendor is treated by the courts as mortgagee. His retention of the title operates as an equitable mortgage, which is of equal import as an ordinary mortgage. They are alike in this essential: That both are securities for a debt. The doctrine of modern times, which is tending to almost universal acceptance, is that the mortgagor is the real owner of the land, and from him it is transmissible by descent, devise, or conveyance, and that the interest of the mortgagee is only regarded as real estate so far as may be necessary to give him the full benefit of his security. The mortgage is a burden and lien imposed upon it as security for the debt. The debt is the principal, the mortgage is the incident." *Strickland* v. *Kirk,* 51 Miss., 798, 799.

Hence we say that, on all three of the pleas filed in this case, the judgment of the lower court should be sustained.

WHITFIELD, C. J., delivered the opinion of the court.

M. Rosenberg, appellant's testator, on the 26th of December, 1900, executed a contract of sale for the storehouse, and the lot on which it stood, to Ben Tee for $1,000, a copy of which the reporter will set out. The purchaser paid $200 in cash, and went into possession under the contract in June, 1901, and subsequently paid $425 before the fire, which occurred on the 28th of December, 1902. The purchaser had thus paid $625 of the $1,000 before the fire. He continued in possession under the contract of sale until the fire, and is still in possession. On the 3d day of September, 1902, after the death of M. Rosenberg, appellee issued the policy of insurance in this case, making the loss payable to "the estate of M. Rosenberg." The contract of insurance provides that, "if the insured is not the sole and unconditional owner of the property, the policy shall be void." Counsel agreed that "the issues are as raised by the pleadings; that no notice of any kind was given appellee of the execution

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of the contract for the sale of the land; that it had no notice of any kind of the existence of the contract, or of the possession of the property by Ben Tee under the contract, until after the fire." The court gave a peremptory instruction for the defendant upon the ground that the insured was not, at the time of the execution of the policy, the sole and unconditional owner of the property. Upon this state of case, we say:

1. That the vendor in a written land contract, who has admitted the vendee into possession, and received from him large payments on the purchase money, is not "the sole and unconditional owner," within the meaning of that clause in this policy, although he retains the legal title. In *Strickland* v. *Kirk*, 51 Miss., 795, it is said: "The vendor is treated by the courts as mortgagee, and his retention of the title operates as an equitable mortgage." The case of *Hamilton* v. *Ins. Co.* (Mich.), 57 N. W., 735, 22 L. R. A., 527, is decisive of this point and of this case. Ben Tee was the equitable owner of this property destroyed by fire. The vendor was a mere trustee of the legal title, to be conveyed upon the payment of the purchase money. See *L., L. & G. Ins. Co.* v. *Cochran*, 77 Miss., 348, 26 South., 932, 78 Am. St. Rep., 524, and also the careful collection of authorities in the very able brief of counsel for appellee, which we direct the reporter to publish in full on account of its excellence. In the case of *Hamilton* v. *Ins. Co., supra*, the authorities are very fully collected and very carefully reviewed. The cases of *Hoose* v. *Ins. Co.*, 84 Mich., 309, 47 N. W., 587, 11 L. R. A., 340, and of *Hall* v. *Niagara Falls Ins. Co.*, 93 Mich., 184, 53 N. W., 727, 18 L. R. A., 135, 32 Am. St. Rep., 497, are accurately differentiated. It is pointed out that in the *Hoose Case* the language of the policy was "to insure Mrs. Margaret Hoose to the amount of one thousand dollars on the two-story building," etc., and that it was clearly the intention to insure only the interest of the applicant, whatever it

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might be. Here the clause expressly stipulates that the insured is the sole and unconditional owner.

2. This condition relates to ownership when the policy was issued. We decided this in *L. L. & G. Ins Co.* v. *Cochran,* 77 Miss., 348, 26 South., 932, 78 Am. St. Rep., 524, and this is undoubtedly the correct rule. See 28 Cent. Dig., p. 1223, sec. 692, pars. "m," "q." The case cited by learned counsel for appellant do not support his contention on this proposition. Even if reference be had to the fact that Rosenberg had taken out other policies of insurance on this property for other years in his lifetime, and that this one was taken out after his death, and even if it be true that no application was ever made, nevertheless the fact that this policy contains this clause expressly, on its face, makes this policy void, under the facts in evidence. In *Syndicate Ins. Co.* v. *Bohn,* 65 Fed., 165, 12 C. C. A., 531, 27 L. R. A., 614, Sanborn, J., speaking for the court, said: "It is contended that the contracts in these policies which exclude the Bohns from insurance under them upon any interest but that of unconditional ownership are without binding force, because no inquiry respecting their title was made by the company, and no statement concerning it was made by the Bohns when these policies were issued. But neither inquiry nor statement, before the issue of the policies, was requisite to the validity of these contracts. The contracts containing, as they did, the stipulations that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership of the property described, and their silence and aceptance of the policies was the answer," citing many authorities. We approve this as a correct statement of the law. See, also, 1 May, Ins. (4th ed.), secs. 2, 3, 87*a*.

Affirmed.

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Statement of the case.

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TIMOTHY N. SHEEHAN ET AL. *v.* ELLA KEARNEY ET AL.*

1. WILLS. *Signing. Code* 1892, § 1520. *Code* 1892, § 4488.

Code 1892, § 4488, providing that a will shall be signed by the testator or by some person in his presence at his direction, is not qualified by Code 1892, § 1520, defining the word "written" and providing that it may include printing, engraving and lithographing, except where the signature of a person is required by law it shall be the proper handwriting of such person, if he be able to write, and if not, his proper mark.

2. SAME. *Aiding testator to sign. Mark of person who can write.*

Another may aid a testator to sign his will, by steadying his hand, and a testator who can write may sign his will by his mark.

3. SAME. *Evidence. Declarations of testator.*

The declarations of a testator touching his testamentary intentions are admissible in evidence on the issue of testamentary capacity and undue influence, whether made before, at the time or after the execution of the will.

4. SAME. *Contest. Burden of proof. Probation prima facie.*

The burden of proof is on the proponents of a will on an issue *devisavit vel non* both as to testamentary capacity and undue influence, but they make out their case *prima facie* by showing the due probation of the will.

5. SAME. *Evidence in rebuttal.*

After contestants have introduced their evidence on the issue *devisavit vel non* to meet the *prima facie* case made by showing the due probation of the will, the proponents may introduce evidence in rebuttal.

6. SAME. *Non-expert witnesses.*

Non-expert witnesses may give their opinions touching the soundness of testator's mind only as based on the facts testified to by them.

FROM the chancery court of Lauderdale county.

HON. NATHAN C. HILL, Chancellor.

Sheehan and others, appellants, were contestants, and Mrs.

*This case was decided at the October term, 1896—December 14, 1896—and was not sooner reported because of the misplacement of the record.

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Opinion of the court.

Kearney and others appellees, were proponents in the court below. The suit was a contest of the last will and testament of one Cornelius Sheehan, deceased. The court below peremptorily instructed the jury in favor of proponents, and from a decree based on a verdict so given the contestants appealed to the supreme court. The opinion states all the facts necessary to an understanding of the case.

A. J. Russell, W. R. Woods, W. T. Houston, G. B. Huddleston, J. W. Sheehan, and Ham, Witherspoon & Witherspoon, for appellants.

Miller & Baskin, Fewell & Brahan and *McIntosh & McIntosh,* for appellees.

[The briefs of counsel in this case have been withdrawn or lost from the record.]

WHITFIELD, J., delivered the opinion of the court.

We do not think the court erred in refusing the peremptory instruction asked by the contestants, the appellants here; but it was clearly erroneous to have given the peremptory instruction asked by appellees, the proponents of the will, upon the testimony in this record. This was peculiarly a case for the jury, under proper instructions from the court, as to the law. A verdict for either party, on this testimony, should not have been disturbed by the court, under proper instructions as to the law. And, as the case must go back for a new trial, we refrain from the expression of any opinion on the facts of the case. Facts are for the jury, the triers of issues of fact. But there are certain errors of law assigned which we will proceed to notice, that the case may, on the new trial, conform to the views herein expressed.

The contestants insist, in the first place, that the alleged will of Cornelius Sheehan was never, in fact, signed by him at all; that there is no signature of his, of any kind, to the will; that that which is called such is an illegible scrawl, no better that a

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straight line would be. They further insist, along this line of contention, that section 1520, of the Code of 1892, qualifies section 4488 of the same code, so as to require a testator to sign his name in his "proper handwriting," and that, hence, no one could sign his name for him, at his request, and that, if he be able to write, his "mark" will not do. This contention is not maintainable. Section 1520 of the code is found in the Chapter on "Definitions" and it means, manifestly, nothing more by the phrase, "shall always be in the proper handwriting of such person," than that the "signature" shall be written, as contradistinguished from engraved or lithographed or printed, in case the party be able to write; and, if he be not able to write, that it is meant that his "signature" in the cases provided by the statute, shall be made by "his proper mark," and not "printed, engraved, or lithographed." This statute does not require the signature to a will to be written out. A mark may still be adopted as a signature. The language in section 4488, "signed by the testator, . . . or by some other person in his presence . . . and by his express direction," demonstrates that the "signature" meant in section 4488 is not, necessarily, one written at all by the testator himself, and discriminates this case from *Ferguson* v. *Board,* 71 Miss., 524, 14 South., 81. It is this section which defines what is a proper signing of a will. The original of section 1520 is found in subdivision 19, sec. 4971, of the Revised Statutes of Wisconsin of 1878, and Justice Cassidy of the supreme court of Wisconsin, in his learned treatise on the Law of Wills, discussing this statute (secs. 63 and 118), says: "But a testator may properly sign by making his mark, independently of this statute, and, if he so sign, it may be unnecessary to prove that he could not write. If he could only sign by virtue of this statute, it might be necessary to prove, in the language of the statute, that he was unable to write. It follows that the testator may sign by his mark, as well as by writing his name—either his signature, initials, or a

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fictitious name." Any signature or mark signed by the testator, or by another in his presence and at his express direction, to the will, as and for his completed signature, and acknowledged and adopted by him as such at the time, in the presence of the subscribing witnesses, is a sufficient signing within the meaning of Code 1892, § 4488. It was said in *Re Plate's Estate,* 148 Pa. St., 55, 23 Atl. 1038: "exactly what constitutes a signing has never been reduced to a judicial formula. The principle upon which these cases proceeded was that whatever the testator . . . . was shown to have intended as his signature was a valid signing, no matter how imperfect, or unfinished, or fantastical, or illegible, or even false the separate characters or symbols he used might be, when critically judged." And we think this clearly correct. It is not necessary that he should write out his complete signature. It is enough that what he writes is intended for and adopted as his complete signature. But it must be carefully noted that, in all that we have thus far said, we have been speaking only of the mere physical act of signing. One without testamentary capacity may write his signature to an alleged will. The testator must have testamentary capacity, and the act of signing must be in exercise of that testamentary capacity. Again, one may have testamentary capacity, and yet be unduly influenced to sign. The testator's signature must be made in the exercise of testamentary capacity, and in the absence of undue influence. Both these grounds the want of testamentary capacity, and the existence of undue influence—are earnestly insisted on by the contestants. And we wish to be understood as intimating no opinion as to the effect of the evidence on either issue, but merely and only as defining what signing is sufficient, in law, under section 4488. It is only necessary to add, in this connection, that the mere steadying, by the draughtsman of the will, of the hand of a testator competent to make a will, and free from undue influence, is immaterial, provided the testator consciously performs,

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himself, the act of writing his signature. *Watson* v. *Pipes,* 32 Miss., 466.

It is next earnestly insisted by appellants, with great wealth of learning and marked force of reasoning, that the declaration of testamentary intention testified to by Taft, Moran, and O'Flyn should not have been admitted. It is conceded that such declarations by a testator as to the disposition he intends to make of his property, before the making of the will, and his declarations, after he has made the will, of what he had intended to do, or has done, in the disposition by will of his property, are admissible, on the issue of testamentary capacity, to show the state of his mind, whether sound or unsound. Such declarations would seem to be declarations symptomatic of the condition of the mind, as exclamations forced by pain or disease from a suffering body are symptomatic of such pain and illustrative of its nature and cause. Irrational exclamations may thus well be symptomatic in one case of a diseased mind, and exclamations of physical pain and anguish in the other case of a diseased body, and competent in both cases, for the same reason, as primary evidence. 1 Greenl. Ev., page 149, sec. 102, and note c.

But it is conceded that they should be admitted on that issue —testamentary capacity—alone, and on the ground indicated alone, and that the instruction to the jury trying the issue *devisavit vel non* should restrict the jury to their consideration in this aspect alone, and that they are never competent to show undue influence in the procurement of the will, whether made before or after the will. To support this contention counsel cites many authorities, relying chiefly on 2 Whart. Ev., sec. 992. But this section only holds, properly understood, that the genuineness of the will conceded, and no issue of undue influence or testamentary capacity being involved, the "intent is to be drawn from the will, and not the will from the intent," and that in such cases parol evidence is not competent to vary,

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enlarge, or contradict the will, not in such case challenged as being the testator's will. This is clearly shown by the fact that *Love* v. *Buchanan*, 40 Miss., 758, and *Gilliam* v. *Chancellor*, 43 Miss., 437, are cited by Mr. Wharton to support the text. In these cases and in *Magee* v. *McNeil*, 41 Miss., 25, there was no question raised as to testamentary capacity or undue influence, but, it being admitted that the instrument was the will of the testator, the effort was to explain, alter, or contradict the terms of the will by parol; and it was very properly held that this could not be done. The effort in *Love* v. *Buchanan* was to show that the word "heirs" did not embrace one who was an heir; in *Magee* v. *McNeil*, to show that a will, conditional as written, was intended to be unconditional; in *Gilliam* v. *Chancellor*, the effort was to show that a sum of $5,000, secured by a marriage contract, was intended to be satisfied by a legacy of $5,000, and in *Gilliam* v. *Brown*, 43 Miss., 641, the effort was similarly to show that a legacy of $15,000 was intended to satisfy an indebtedness of the testator to his brother, the legatee. In the last two cases of satisfaction or ademption by the legacy, the court did not deem it necessary to a decision to decide the point as to the competency of parol testimony. And, to place beyond dispute what was meant by Mr. Wharton in the section cited by counsel, he expressly declares the law on the precise point under review to be (Section 1012, same Volume) as follows: "Hence, whenever a will is attacked on the ground that it does not exhibit the testator's real intent, he being in disturbed mind or under undue influence at the time it was executed, it is admissible to put in evidence his declarations in support of the will." What is said by Mr. Greenleaf (2 Greenl. Ev., sec. 690), on this subject, to the effect that such declarations, before or after the will is made, are not even competent to show insanity, is shown by Seldon, J., in *Waterman* v. *Whitney*, 11 N. Y., 157, to be clearly unsound, as is pointed out by the accomplished editor

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of the American Decisions in his learned note to *Jackson* v. *Kniffen,* 3 Am. Dec., at page 397. Learned counsel also relies strongly on the statement of Mr. Bigelow, in his note in 1 Jarm. Wills (6th ed.), at page 71, to the following effect: "By the weight of authority, and in principle, the statements or declarations of the testator, whether made before or after or at the time of executing the supposed will, are not admissible in evidence to prove undue influence or fraud. To receive evidence of that kind would be to receive heresay," citing many authorities. But an examination of these authorities will show that they do not bear out Mr. Bigelow in his sweeping statement. One of the cases on which he mainly relies (*Shailer* v. *Bumstead,* 99 Mass., 112) holds the direct contrary, as may be seen at page 120, 99 Mass. This case is clearly discriminated, and its true holding on this precise point is accurately stated in the note, above referred to, at page 397, of volume 3 of the American Decisions, where the annotator says: "In case of insanity or undue influence, the evidence takes a wider range, and here the subsequent as well as the prior declarations of the testator are admissible. This is fully borne out by *Waterman* v. *Whitney,* 11 N. Y., 157; *Boylan* v. *Meeker,* 28 N. J. Law, 274; *Shailer* v. *Bumstead,* 99 Mass., 112; *McTaggart* v. *Thompson,* 14 Pa. St. 149; *Dennis* v. *Weeks,* 51 Ga. 24. There is not in this instance the same objection to the evidence, as in the other cases, as being heresay. For this purpose it is direct and primary." Now, Mr. Bigelow, distinctly concedes, in his note (page 71), that the declarations are not to be excluded because of the objection that the statute requires wills to be in writing, but solely because that they are heresay: "For the very question under consideration is whether there be a will, . . . the declarations would be admissible, if they were not heresay." While the annotator of the third volume of American Decisions distinctly declares that, on principle and authority, they are not heresay on this issue, but "direct and primary evidence." We

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think this latter declaration the true rule, at least to the extent that the declarations are competent, is the sounder. It is curious that Mr. Bigelow, a most accurate law writer, should have fallen into this misconception, when, in the very same note, in discussing the burden of proof on the issue of undue influence, he says at page 68: "The objection of undue influence may seem, at first, of the nature of a defense or confession and avoidance in common-law pleading. It virtually admits the testator's competency, though not his entire soundness of body or mind, and the due execution of the instrument, but seeks to avoid the effect thereof. But, in reality, it denies that the supposed will is the will of the supposed testator. That is, it traverses; and, as it is for the one who offers the instrument for probate (an instrument under which the rights of widow, heirs, and next of kin, under the law, are disturbed) to prove it to be the true will of the alleged testator, it should follow, in principle, that the burden of proof, as well in regard to undue influence as in regard to capacity, should rest upon him"— a statement, the correctness of which we fully indorse and which seems logically to follow from another well settled principle, declared by Mr. Bigelow at page 66 of said note, towit: "It is true that, while the question of capacity must be kept distinct from—that is, not confused with—the question of undue influence, the state of mind and body of the supposed testator at the time of executing the will may be, and commonly is, a material subject for consideration, in determining whether undue influence has been exercised upon him." Now, if it is part of the *prima facie* case of the proponents of a will, in showing that it is the alleged testator's will, to show *prima facie* that it is so for one reason, because he was not unduly influenced to make it; and if, as correctly stated by Mr. Bigelow, the real inquiry on an issue of undue influence is whether the instrument be, in fact, the alleged testator's will, then, clearly, the exclusion of the declarations must rest on the assumption that the

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instrument is the testator's will, the very point in issue. The very same reasoning which makes it improper to exclude such declarations as infringing the statute requiring a will to be in writing, because so to exclude them would assume that the instrument was the will of the alleged testator, equally makes it improper to exclude them on the ground of heresay, on an issue of undue influence, because such exclusion, in that view also, assumes that the instrument is the will of the alleged testator. The statement of the law on this point, in the note in the third volume of American Decisions, is therefore manifestly the sounder doctrine. And that it is, the following authorities, in addition to those cited in that volume, unanswerably demonstrate: 7 Am. & Eng. Enc. Law, p. 73; *Collagan* v. *Burns,* 47 Me., 449 (the best reasoned case we have seen); *Roberts* v. *Trawick,* 17 Ala., 55; *Chappell* v. *Trent,* 90 Va., 849, 19 S. E., 314; Cassody, Wills, secs. 316, 317; *Boudinot* v. *Bradford,* 2 Dall., 266; *Durant* v. *Ashmore,* 2 Rich. Law, 184; *Steele* v. *Price,* 5 B. Mon., 58, 66; *Weeks* v. *McBeth,* 14 Ala., 474; *Lawyer* v. *Smith,* 8 Mich., 411; *Harring* v. *Allen,* 25 Mich., 505; *Patterson* v. *Hickey,* 32 Ga., 156; *Tynan* v. *Paschal,* 27 Tex., 286; *Renaud* v. *Pageot,* 102 Mich., 568, 61 N. W., 3; *McHugh* v. *Fitzgerald,* 103 Mich., 21, 61 N. W., 354; Beach, Wills, sec. 115.

We have thus far said nothing of *Tucker* v. *Whitehead,* 59 Miss., 594, because learned counsel attempt to distinguish that case, in principle, from the authorities holding such declarations competent on an issue of undue influence, on the ground that that case was one as to the competency of declarations made by the testator, where the act of revocation—tearing off his name—was not shown to have been done by the testator. It is insisted that, in such case, the statutory act of revocation being equivocal, such declarations, not made at the time of tearing off the name, were admitted to make certain what otherwise was uncertain—whether the name was torn off by the testator or a

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spoilator. It is true that only was the point decided, but the language of the court shows that the whole subject had been explored and the authorities cited go the whole length of holding the competency of the declarations on an issue of undue influence; the one emphasized by Judge Chalmers, *Collagan* v. *Burns,* 57 Me., 449, especially. It is noteworthy that five of the cases cited by Judge Chalmers are cited by Judge Cassody (Wills, sec. 316), to sustain the proposition that it is "well settled that such declarations are admissible" upon the issue of undue influence. That case, therefore (*Tucker* v. *Whitehead*), is strongly persuasive of the view of this court at that time, and our researches confirm the soundness of the view indicated therein. So far as all that may be said touching the unreliability of such declarations is concerned, it may be replied, in the language of Judge Chalmers in that case, that "the evils which may spring from the introduction of parol proof in such a case are less than those which must be wrought by its exclusion," and in the language of the supreme court of Maine in *Collagan* v. *Burns,* 57 Me., at page 458, that "the exclusion of evidence, relevant and material, from the fear that it may not receive its just degree of credence, is the resort of barbarism. Civilization hears, weighs, examines, compares, and then decides." Indeed, it is worthy of special observation that it is held, in this last case, that "whether it be the making of a will or the destroying of one, the evidence in each case is alike, and for the same reason admissible." So far as the objection that such declarations infringe the statute requiring wills to be made in writing is concerned, it is obvious that the statute also requires wills to be revoked in a particular mode, pointed out therein. In one case the inquiry is whether the instrument is still his will; and in the other, whether it ever was his will. But we mean to decide only that, on the issue of undue influence the declarations were competent. Many of the authorities holding such declarations incompetent on the issue of undue influ-

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ence are cases in which the only question was whether, the will being admitted to be the testator's will, the proof was offered simply to contradict or vary its terms, and the decisions are malapropos as to the point here involved. It is sometimes said, accurately enough, that such declarations are not competent as admissions against interest, not being, like declarations of one in possession of real estate that his possession is permissive, characterizing his possession because the testator is not a party to the suit on an issue *devisavit vel non*—he has no interest. And it is sometimes loosely said, with far less accuracy (if, indeed, it be an accurate statement at all), that such declarations are no more competent than like declarations of a grantor in a deed, or the party to any written contract. But, as pointed out by the editors of the American Leading Cases (*Lawson* v. *Morrison,* 2 Am. Lead. Cas., 488), and in *Collagan* v. *Burns,* 57 Me., 454 a will is ambulatory and no one has any vested rights thereunder, till death to be affected by such declarations. And it is sometimes said that these declarations are not evidence of the truth of the facts stated in them. But, as shown in *Jackson* v. *Kniffen,* 3 Am. Dec., 397, note, they are primary evidence of unsoundness of mind, and of undue influence as implicated in, and involved in such unsoundness of mind; the two things being, in the nature of things, logically, to some extent, indissolubly blended. It may be that the true solution of the apparent confusion is this: That what such declarations are evidence of is, not in themselves alone that the testator *did have* the testamentary intentions he declared he had, for he may have wished to conceal his intentions, but that he did say he had the testamentary intentions testified to; and the jury are then to draw such inference as the whole evidence warrants, that they were or were not his real testamentary intentions, at the time of making the declarations, as compared with those set forth in the will, and looking to the change or absence of change in his condition, family, property, state of feelings, affections, etc., between the time

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of making them and the will. The witnesses might speak truly in testifying that he did make the declarations and yet he may not, in fact, have had such testamentary intentions. Whether his testamentary intentions were, at the time of making the declarations as declared, the jury are to determine, as stated, from the whole evidence. And if, from the whole evidence the jury believe they were really as declared at that time, an inference might legitimately be drawn that when the subsequent will conformed to them, they had continued down to the making of the will, and when the subsequent will did not conform to them, the testator had purposely misstated his intentions for some reason, or that he had changed his intentions, or that the will was not his will, but the product of undue influence. But the whole probative value of them is for the jury and not for the court. In the case at bar all of the testamentary declarations do not conform to the alleged will, and this, of course, is a circumstance which the jury are to weigh in their consideration. Our conclusion is that the declarations of an alleged testator whether made before, after, or at the time of making the alleged will, as to his testamentary intentions, are both on the issue of testamentary capacity and of undue influence, competent evidence. The court did not err, therefore, in admitting them.

The next point which we shall notice is upon whom is the burden of proof as to testamentary capacity and undue influence. It will be seen, by reference to the elaborate note to *Prentiss* v. *Bates* (Mich.), 17 L. R. A., 494, (50 N. W. 637, 53 N. W., 153), that there is a great conflict of authority on the former question even; and, by reference to *Baldwin* v. *Parker,* 96 Am. Dec., 697, that like conflict of authority exists as to the latter. So far as the former question is concerned it is settled in this state, in *Tucker* v. *Whitehead,* 59 Miss., 594, that the burden is on the proponents throughout, and it is expressly so enacted by sec. 1825, Code 1892. As to the burden where the issue is undue influence, it is held, in *Baldwin* v. *Parker,*

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supra, and in other authorities, that the burden is on the contestants. But to our minds, the reasoning is very unsatisfactory. On the other hand, it is squarely decided, in *Prentiss* v. *Bates, supra* (decided in 1892 by the supreme court of Michigan); in *Chappell* v. *Trent,* 90 Va., 849; 19 S. E., 314 (decided in December, 1893); in *Runyan* v. *Price,* 86 Am. Dec., 459; and apparently in *Barry* v. *Butlin,* 1 Curt. Ecc., 638, that the burden is on the proponents of the will. It is correctly said by Baron Parke, in this last case, that the "strict meaning" of the term, *"onus probandi,"* is this, that if no evidence is offered by the party on whom the burden is cast, the issue must be found against him. Now, when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity; and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof, properly understood. And, just so, we think that the production of such will and such record of probate, under our statute, raises the presumption that the alleged will was the free and voluntary act of the alleged testator. It is not only necessary that the testator shall have testamentary capacity, but that that capacity shall be exercised freely and voluntarily. If either its existence or the freedom of its exercise is wanting, the instrument is not the alleged testator's will. Both are essential parts of the proponent's case. The issue is single-will or no will. And when we consider that the exercise of undue influence implies some degree of mental capacity to be overcome, and how indissolubly the two things are implicated the one in the other, it seems to us clear that the burden as to both is on the proponent throughout, and there is no shifting of this burden. But the burden in both respects is satisfied by the introduction of the will and the record of the probated will, and the contestants must then offer proof to overcome the *prima facie* case thus made in both

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respects. In the course of the opinion in *Baldwin* v. *Parker,* 96 Am. Dec., 704, quoting from *Boyse* v. *Roseborough,* 6 H. L. Cas., 49, it is said, "that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it," and that "undue influence is not to be presumed"; and this is cited as an authority for the view we are combating. But the language, "apparently a free agent," shows clearly that it is meant that the legal presumption where capacity exists, is that the testator was a free agent. And this presumption, of course, meets the burden, and puts the contestant to proof. "Undue influence is not to be presumed," certainly. To put it in exactly equivalent phrase, it might be said, that the alleged testator was not a free agent is not to be presumed. On the contrary, capacity proved, the legal presumption is that he was a free agent — that the alleged will was his free and voluntary act. And this presumption satisfies the burden of proof as to undue influence, and the contestant is thus put to his proof. That is the whole meaning of that case, and of others wherein this question is obscurely and inaccurately treated. Mr. Bigelow has stated the true rule in the quotation we have above made from his note to 1 Jarm. Wills. It is true he refers to three cases, apparently holding the contrary (see p. 68)— *Potter's Appeal,* 53 Mich., 106, 18 N. W., 575; *In Re Martin,* 98 N. Y., 193; and *Armstrong* v. *Armstrong,* 63 Wis., 162, 23 N. W., 407; but they fall clearly within the explanation there made by Mr. Bigelow, and are not in real conflict with the views we have expressed. See, specially, also, what Mr. Bigelow very accurately says as to the loose talk about the shifting of the burden of proof at page 65 of this very valuable note. The view we take, that the burden of proof as to undue influence — that is better phrased, that the testator executed the will freely and voluntarily — is upon the proponents throughout the trial

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of an issue *devisavit vel non* is, we think, meant to be declared by our statute and is in harmony with our decisions along this general line, as, for instance, as to the burden of proof of sanity being on the state in criminal trials. *Ford* v. *State,* 73 Miss., 734, s. c., 19 South., 665. We, therefore, hold, on this proposition, that the burden of an issue *devisavit vel non,* is, both as to testamentary capacity and undue influence—or, better, that the testator was a free agent — on the proponents throughout. The court, therefore, erred in holding that the burden was on the contestants.

In the the course of the trial the proponents offered the record of the probate of the will, and the will, and rested. The contestants then introduced their testimony as to testamentary capacity and undue influence and rested. The proponents then introduced testimony as to these two matters in rebuttal. Contestants objected to this testimony as not in rebuttal, insisting that all the testimony proponents had on these points should have been offered in chief. The court correctly overruled this objection. That the course pursued in the conduct of this trial was correct is expressly decided in *Runyan* v. *Price,* 86 Am. Dec., 459, and *In re Lehman's Will,* 40 Minn., 371, 42 N. W., 286.

With respect to the rule as to allowing nonexperts to give their opinion as to the soundness of mind of the subject of inquiry, the true view is set forth in *Wood* v. *State,* 58 Miss., at page 742. They should testify as to the facts, acts, declarations, etc., of the subject of inquiry, and then give their opinions based upon these facts. Unless the attending physician (in this case, Dr. Lowry) is qualified as an expert, the rule applies to him, and should be observed. And this method of examination on the new trial should be rigidly adhered to as to all nonexpert witnesses.

Most of the other very numerous assignments of error are to the action of the court in allowing proponent's counsel to ask leading questions in chief. Very many of them are well taken.

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Statement of the case.

It would too greatly protract this opinion to notice them *seriatim*. Care should be taken to avoid this error on the new trial. We remark, finally, that inasmuch as the learned court below was not called on to instruct the jury as to what constituted testamentary capacity or undue influence, we have nothing before us on either of these points — no action of his to review. For the errors indicated the judgment is reversed, and the cause remanded.

Reversed and remanded.

MARGARET BLANKS *v.* SOUTHERN RAILWAY COMPANY.

1. MARRIAGE. *Common law. Married woman.*

A married woman cannot contract a common law marriage.

2. SAME. *Agreement. Cohabitation.*

Cohabitation, however long continued, between a married woman and an unmarried man will not ripen into a valid common law marriage, although from the beginning they agreed to be husband and wife, and constantly thereafter claimed and held themselves out to the world to be married each to the other.

FROM the circuit court of Clay county.

HON. WILLIAM F. STEVENS, Judge.

Mrs. Blanks, appellant, was plaintiff in the court below; the railway company, appellee, was defendant there. In truth, however, the suit was defended (for reasons apparent from the opinion of the court) by the brothers and sisters of Daniel Blanks. The court below gave a peremptory instruction for defendant, and from a verdict and judgment in pursuance thereof, the plaintiff appealed to the supreme court. The facts are stated in the opinion of the court.

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Brief for appellant.

F. G. Barry, for appellant.

If the *Beardsley Case,* 79 Miss., 417, and the cases of our state which it follows, are to continue to be the law, then, in my opinion, this case is bound to be reversed.

First. If the learned judge in the court below was satisfied that the marriage of Maggie and Dan Blanks was a valid common law marriage, then he should have given the peremptory instruction asked by Maggie Blanks, in accordance with the positive and distinct law as laid down in the *Beardsley Case.*

Second. If the learned judge below did not believe this was a common law marriage, then he usurped the function of the jury and decided a fact which should have been left to the jury. The testimony is overwhelming that this was a valid common law marriage, instituted somewhere about 1884, 1885, or 1886. It unmistakably antedates our Code of 1892, abrogating common law marriages.

The next proposition I beg to submit is, and which is undisputed, that every presumption of innocence is to be indulged in favor of marriages; and I find no law attaching any additional solemnity to a statutory over a common law marriage. A common law marriage, where permitted, is as sacred in the eye of the law as one solemnized by an archbishop, to the strains of Mendelshon's marriage march, or even by a justice of the peace, or a grave and dignified member of the board of supervisors. This presumption of innocence is not confined to any special period when the marriage is solemnized, or entered into.

Third. But I submit if a marriage is entered into before the expiration of the seven years' statute, which raises a presumption of death after the absence of party unheard of and in unknown parts, then this presumption of innocence ripens unto one of perfect immunity to the deserted spouse who has married; that the presumption of innocence at the end of the seven years becomes conclusive and was a shield and protection to Maggie Blanks as much as if Lawson Parker had been, in

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Brief for appellant.

fact, dead. The proof is positive and clear that for the entire period of seven years after her marriage with Dan Blanks and the departure of Lawson Parker, her supposed husband, no one knew or heard of the said Lawson Parker.

McWillie & Thompson, on same side.

The court below at the conclusion of the evidence resolved the question, as a matter of law, and gave a peremptory instruction for defendant, and the plaintiff hath appealed to this court.

Of course, the main question before this court, and the only one on this branch of the case is, whether or not a verdict in plaintiff's favor, if rendered, should have been permitted to stand as one supported by evidence, and on this point the inquiry is, did any of the evidence tend to support plaintiff's case so as to make it a proper one to have gone to the jury?

To understand the plaintiff's case it is necessary, first, to determine the date of her marriage—a good common law marriage —to the deceased Daniel Blanks. The date is not shown absolutely, but the evidence clearly and unmistakably fixed the date as anterior to the adoption of the Code of 1892. Therefore, Code 1892, § 2864, has no application to the case.

The evidence is certainly ample to establish not only *prima facie* but almost conclusively a valid common law marriage. 19 Am. & Eng. Enc. Law (2d ed.), p. 1181, and authorities cited.

Such marriages were recognized as valid in Mississippi before the adoption of the Code of 1892. *Dickerson* v. *Brown,* 49 Miss., 357; *Floyd* v. *Calvert,* 53 Miss., 37; *Rundle* v. *Pegram,* 49 Miss., 751; *Hargroves* v. *Thompson,* 31 Miss., 211.

It was not shown absolutely and conclusively that plaintiff's pretended first marriage, the one to Lawson Parker, was valid.

If the marriage to Parker was valid, yet every presumption favors the validity of the second one — the marriage to Dan Blanks; even a divorce from the first husband will be presumed,

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Brief for appellee.

and the burden of proof was on defendant to rebut these presumptions. No evidence whatever was introduced to rebut presumptions, nothing to show that a divorce was not obtained; on the contrary, the testimony at least slightly tends to show a divorce.

The case of *Alabama & Vicksburg Ry. Co.* v. *Beardsley,* 79 Miss., 417, settles this question.

S. G. Ivey and *T. C. Kimbrough,* for appellee.

In *Alabama & Vicksburg Ry. Co.* v. *Beardsley,* 79 Miss., 417, this court says "that a divorce from a former wife who is still living will, in the absence of other evidence, be presumed upon due proof of the husband's second mariage. A marriage duly proven will be presumed valid, etc."

There was no question about the second marriage in that case. It appeared uncontradicted that it had been solemnized according to the form of law, every presumption must be indulged in favor of its validity. *Hull* v. *Rawls,* 27 Miss., 471; *Powell* v. *Powell,* 27 Miss., 783; *Ward et al.* v. *Dulaney,* 23 Miss., 410; *Wilkie* v. *Collins,* 48 Miss., 496.

Mayes & Longstreet, on same side.

This case is not controlled by the *Beardsley Case,* 79 Miss., 417. It is in a very different attitude. There the court had before it only three facts: (1) the former marriage, (2) the later marriage, (3) the life of the former wife. The question of the validity of the second marriage had not been put formally in issue by the pleadings, but cropped out as a surprise to the plaintiff on the trial; and when it did crop out there was absolutely nothing to challenge the validity of the second marriage except the isolated fact that the husband's first wife was still living; and this court properly held that in such case, no question being made about the due and actual solemnization of the second marriage, a divorce would be presumed. If the man

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Opinion of the court.

had not been divorced, he was unquestionably guilty of bigamy.

In the case at bar, the very question in issue, formally so put, is whether there ever was a second marriage. In the *Beardsley Case*, there were no facts whatever before the court except the ones stated above; while here all the facts are before the court and the plaintiff's own testimony shows that her relation with the deceased was one of concubinage in its inception, and never was anything else.

CALHOON, J., delivered the opinion of the court.

Daniel Blanks was run over and killed by an engine of the Southern Railway Company while he was in the service of that company, and Margaret Blanks sued the company, claiming to be his widow. A separate action for damages was brought by his heirs. The company admitted liability, and the parties to both actions agreed that, if Margaret recovered in her action, the recovery should be $1,250. The court below peremptorily instructed the jury to find a verdict for defendant company, and the only question is whether she was the wife of the deceased, and this must be determined on her own testimony. Her only pretense of wifehood in her relations with Daniel is based on her claim that there was a valid common law marriage between them before the Code of 1892, requiring formal celebration, took effect. Her story is that she, at the time when she had never been married, though she was the mother of a bastard child, some twenty years ago, was married to a man who, inasmuch as he was not the father of the bastard, we may assume, on matrimonial concerns, was free from petty scruples. His name was Lawson Parker. As to this marriage we quote from plaintiff's testimony as shown in the record: "Q. Were you ever married legally? A. I don't know, sir. Q. Didn't you say you were maried to Lawson Parker? A. I had a man by that name. Q. Were you legally married to him? A. I don't know. He and a preacher were there, by the name of Hamp

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Crawford. Q. Did he perform a ceremony? A. I don't know, sir. He said something. Q. Did he pronounce you man and wife? A. I don't know, sir; but we went together under that head." She says this marriage with Lawson was at her father's house. Pursuant to that maneuver, Maggie and Lawson lived together "under that head"— that is, under the head of husband and wife — for, as she says, two or three years, when Lawson, weary of well-doing, threw off the connubial yoke and of his own motion, without disturbing the courts, left for parts unknown. Something more than a year after his departure, a singular courtship occurred. She says that she was sitting in her door, when Daniel Blanks, the deceased, who was a perfect stranger, whom she had never seen before, came up, and she says: "He preferred he was lonely. I was sitting in the door there by myself, and he asked me if I was lonely, and I preferred yes, I was lonely, and he asked then if I would like to be his wife, if I would be the mother of his child, and I said I thought I could, and he asked me if I could live in his house and treat him adjustably, and I told him I thought I could. Q. Did you tell him in what way you wanted to live? A. As his wife. That is the way I went to him. I did not reconsider myself to have any husband after Lawson left me, and I was living there from hand to mouth, and I wanted a husband, and he said he would be a husband to me, and I said as I was a woman I would accomplish to be his wife, and I went with him." On this primitive, prepluvial agreement they lived together for many years, and up to the time of Daniel's death. But after about a year of their cohabitation there was an unfortunate episode. Lawson Parker turned up! He appeared at Maggie's new home in quite a violent humor, and proceeded to abuse and beat her, without any interference from Daniel, so that she had him arrested and put under bond to keep the peace, and then he left again, and has been seen no more, and Daniel and Margaret continued to live together for ten years or more, until Daniel

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Statement of the case.

was killed by the railroad train. We cannot hold that she was Daniel's wife. In this case the precise issue joined and the only issue tried is whether she was his wife. Since she claimed as such, and since this is specifically denied, the burden is on her to show the legal marital relation. This burden she has not discharged. By her own showing, Lawson Parker was alive when she commenced her cohabitation with Daniel Blanks. This, therefore, was unlawful when it commenced, and continued to be so. No adjudication conflicts with our conclusion on the facts of the case before us, even if we held — which we do not — that the arrangement with Blanks, as detailed, would have been, but for Margaret's previous marriage, a valid common law marriage.

Affirmed.

WILSON P. KEENAN ET AL. *v.* THADDEUS P. HARKINS ET AL.

1. BOARD OF SUPERVISORS. *Judicial action. Adjournment. Power to vacate.*

The board of supervisors, after final adjournment, is without power, ordinarily, to reverse or vacate its judicial acts.

2. SAME. *Code* 1892, § 2059. *Stock law district. Adding territory.*

Where territory has been added to a stock law district by order of the board of supervisors the board cannot at a subsequent meeting vacate the order, except as authorized by statute, Code 1892, § 2059.

FROM the circuit court of Leake county.

HON. JOHN R. ENOCHS, Judge.

Keenan and others, appellants, petitioned the board of supervisors at its December term, 1902, to vacate an order made by the board at its May term, 1902, adding certain territory to a

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Syllabus.

stock-law district; Harkins and others opposed the petition, and the board of supervisors denied the same; appellants, petitioners, appealed from the board to the circuit court, and that court having decided against them, they appealed to the supreme court.

Robert L. Bullard, for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The board of supervisors has ordinarily no power to review or reverse or vacate its own judicial action after final adjournment. This case falls within none of the exceptions. Am. & Eng. Enc. Law (2d ed.), vol. 7. p. 1008.

Affirmed.

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185 564

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY *v.* ALFRED H. GEORGE.

1. RAILROADS. *Carriers of freight. Rules. Demurrage.*

A railroad can make and enforce rules imposing reasonable demurrage charges on consignees for delay in unloading cars.

2. SAME. *Lien for demurrage. Code* 1892, § 2108.

Code 1892, § 2108, giving a carrier a lien for freight and storage, with power to sell therefor, applies to demurrage for delay in unloading cars.

3. SAME. *Notice.*

Formal notice is unnecessary to make a consignee liable for demurrage charges, if he knows of the arrival of the cars for him.

4. SAME. *Private sidings. Delivery, when full. Partnership sidings.*

Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding be full, the

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Statement of the case.

road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding.

5. SAME. *Demurrage on certain freight. Not on all.*

A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds.

6. SAME. *Several cars. Demurrage enforced on one for all.*

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against its contents separately, but enough may be retained to satisfy the charge against all.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

George, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. The action was replevin for certain freights consigned to appellee and upon which the railroad company contended certain demurrage charges had accrued, and which plaintiff had declined to pay. The railroad claimed the demurrage under certain rules of the Alabama Car Service Association, to which it belonged, and of the Mississippi Railroad Commission. These rules were offered in evidence and are as follows:

RULES OF THE ALABAMA CAR SERVICE ASSOCIATION.

"Rule 1. *Per diem charges.*—All property shipped in carload lots shall be subject to car service and trackage charges in accordance with the following regulations: A charge of one dollar per car per day or fraction thereof shall be made for the delay of cars and the use of tracks within the following described territory, after forty-eight hours from arrival thereat, not including Sundays or legal holidays.

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Statement of the case.

"Rule 2. *Rules for reckoning time.*— On cars arriving during the forenoon after 7 A. M., and held for orders from consignees, car service will be charged after the expiration of forty-eight hours from 12 M. of that day, and on cars arriving after 12 M. to and including 7 A. M. of the following day, car service charges will commence forty-eight hours from 7 A. M. of the following day, provided notification has been given during the day previous to this time. Should notification not be given within the time, car service will commence forty-eight hours from the hour of notification. On cars consigned to team tracks, and which may be so delivered on advance or standing order from consignee, car service will be charged after the expiration of forty-eight hours from the time such cars are placed on the tracks designated.

"Rule 3. *Cars for delivery on team tracks and private sidings.*— Cars containing freight to be delivered on team tracks or private sidings shall be delivered on the track designated immediately upon arrival, or as soon thereafter as the ordinary routine of yard-work will permit. (a) The time consumed in placing such cars, or in switching cars for which directions are given by consignees, after arrival, shall not be included when computing detention. (b) The delivery of cars consigned to or ordered to sidings, used exclusively by certain firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted. (c) No cars shall be held from delivery in any manner, provided it is possible to secure their delivery, and the manager is charged with the duty of seeing that the purposes for which this association is formed are not evaded by the action of any railroad company. (d) On deliveries to sidings, used exclusively by certain firms or individuals located on said sidings, and where consignees or consignors refuse to pay, or unnecessarily defer

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Statement of the case.

settlement of bills for car service charges, the agent will decline to switch cars to the sidings where such parties are located, notifying them that deliveries will only be made to them on the public delivery tracks of the company after the payment of freight charges at his office, and will promptly notify the manager of the action taken."

. . . . . .

"Rule 9. *Collections.*—Agents will collect car service charges accruing under the rules of the association with the same regularity and promptness as other transportation charges, and the manager is charged with the duty of seeing that these rules are enforced without discrimination. (a) It is the duty of the agent to demand car service on all cars before delivering them, where service has accrued between notification and ordering. It is also the duty of the agent, where he has any doubt about service being paid, to demand one dollar car service at the end of the free time allowed for unloading cars; and, if said car service is refused, to decline to deliver the car and to allow the lading to be taken from it, either by sealing the car, locking the car,, or placing it where it is not accessible to consignee. (b) All collections for car service charges shall belong to the road upon whose tracks the cars are detained. (c) Railroads shall not discriminate between persons in car service charges. If a railroad company collects car service from one person, under the car service rules, it must collect of all who are liable."

. . . . . .

"Rule 12. *Storage.*— No railroad company, member of this association, shall provide free storage in its freight warehouse of contents of loaded cars subject to car service charges, but any railroad company may unload cars subject to car service charges into its own warehouse or into public or private warehouses subject to the following rules and regulations: . . . ."

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Statement of the case.

RULES OF THE MISSISSIPPI RAILROAD COMMISSION.

"Rule 1. *Railroad companies to give prompt notice of arrival of goods.*— Railroad companies shall give prompt notice, by mail or otherwise, to consignee of arrival of goods, together with weight and amount of freight charges due thereon; and, when goods or freight of any kind in carload quantities arrive, said notice must contain letters or initials of the car, number of the car, net weight and the amount of freight charges due on the same. Storage and demurrage charges may be assessed if the goods are not removed in conformity with the following rules and regulations. No storage or demurrage charges, however, shall in any case be allowed, unless legal notice of the arrival of the goods has been given to the owner or consignee thereof by the railroad company.

"Rule 2. *Definition of legal notice.*— Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock A. M. on the day after such notice has been given."

. . . . . .

"Rule 4. *Demurrage on loaded cars — how assessable.*— Loaded cars, which by consent and agreement between the railroad and consignee, are to be unloaded by consignee, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock A. M. of the day following the day legal notice of the arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day or fraction of a day that said car or cars remain loaded in the possession of the railroad company; it being understood that said car or cars are to be placed and remain accessible to the consignee for the pur-

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Statement of the case.

pose of unloading during the period in which held free of demurrage; that when the period of such demurrage charges commences they are to be placed accessible to the consignee for unloading purposes on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby; provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, lime, ore, sand or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two (72) hours."

. . . . . .

Plaintiff was engaged in the wholesale grain and feed business in Meridian. He handled large numbers of cars of hulls, feed stuff, grain, and other commodities requiring track delivery. Some of these cars were unloaded at Meridian, and some rebilled to other points. For convenience in unloading and handling freight, George had leased a portion of a warehouse which was located on a spur track known as the "Compress Track," the larger part of which was used by the Cotton Compress Company and other concerns; and, as their warehouses were situated further up the spur track, all of the cars used by them had to pass over that portion of the track to the use of which George was entitled, thus necessitating the reswitching and replacing of his cars; but the lease to George was made with full knowledge on his part of this condition of affairs. George's warehouse only had trackage for four cars. It was the usual course of dealing between George and the railroad company that the cars were to be set into his sidetrack on arrival, without special demand, and the representatives of the Alabama Car Service Association would check the cars on the track each day to see that there was no unnecessary delay in the switching

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Statement of the case.

and placing of the cars. The railroad company also had an employe who was charged with the duty of checking all cars on the track, and this double checking was recorded in books kept for that purpose, and the results compared to guard against errors. On Saturday, December 7, 1901, a train of twelve cars loaded with cotton seed hulls, loose in bulk, reached Meridian, consigned to George. On arrival this train was placed on the storage track, appellant contending that was necessary on account of the crowded condition of the compress track. On Monday, the 9th, the compress track being still crowded with cars, the train was switched to the waterworks track. It was shown that at this date the railroad business at Meridian was extremely large. Every track was in constant use. Every car was needed for the transportation of cotton and other freight. On the same day notice of the arrival of this freight was sent to George, but he declined to receive the freight bills, claiming an overcharge. George denied that the freight bills were tendered to him, but he paid the freight charges on the twelve cars of hulls on the 13th inst., and either that day or a few days thereafter, had the overcharge corrected. George knew of the rules of the Alabama Car Service Association, was familiar with the provisions regarding demurrage, had paid some demurrage and had refused to pay some, and at this date had a litigation pending about another matter of demurrage. None of the cars composing the train were placed in front of the warehouse of George. The Car Service Association's representative and the railroad company's car checker both testified that at no part of the "free time" after the arrival of this train did George have less than four cars on his sidetrack, and an inspection of their original books corroborates this. George was notified during the free time that demurrage would accrue, and shortly after the free time expired he was again advised of this claim, and then and there denied his liability, denied the right of the railroad company to claim demurrage, and refused to pay. The

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Brief for appellant.

manager of the Car Service Association instructed the railroad company not to deliver the cars until the demurrage was paid. So matters stood until about 1st of February, 1902, when the railroad company released six of the cars to George, and notified him of its intention to sell the contents of the remaining six for the demurrage on the twelve. Thereupon this suit was filed for the contents of five, the hulls in the other proving worthless. At the conclusion of the testimony the court refused a peremptory instruction for the defendant, and submitted the case to the jury under instructions for both sides. The jury found for plaintiff, a judgment was entered on the verdict in plaintiff's favor, and the railroad company appealed to the supreme court.

Fewell & Son, for appellant.

The questions involved in this case are:

1. Did the appellant have the right to charge demurrage?

2. Did the appellant have the right to refuse to deliver the contents of the cars or to set the cars into appellee's warehouse because of the refusal of the appellee to pay the demurrage?

3. Whether any demurrage had accrued.

If the railroad company had a right to hold the cars for demurrage, as the court instructed it had, and if any demurrage was due, George had no right to the possession of the hulls until and unless the amount so due was either paid or tendered. He had notice of the arrival of his cars, he admits that he knew of their arrival; he paid the freight on them; he allowed them to remain on the siding on which they were placed until the "free time" had expired; he made no offer to pay any amount and allowed the cars to remain there about two months, continuing to have other cars set into his siding and keeping the room he had (which was only for four cars) occupied constantly, never giving any notice of there being room. According to appellee's theory, it was the duty of the railroad company to keep a con-

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stant watch on the "compress sidetrack," and from day to day and from hour to hour to put a car or cars into that siding whenever there was room, whether George wanted them set in or not. We know of no rule or law which requires a carrier, especially under the circumstances of this case, to keep such watch. Besides the undisputed fact that the siding referred to served other people and was all of that season very much crowded, shows it to have been impossible to find room for George's cars. If he wanted the twelve cars to be placed on the siding in preference to others he was daily handling, did it not devolve on him to make a request to that effect? Allowing cars daily arriving to be put in was an acquiescence in that course. He knew that the demurrage was accruing, and yet he took no steps to stop it; he chose to use the appellant's cars as warehouses for his stuff, thus putting the appellant to great loss by that use of its cars and its siding. There is no dispute that the siding to the appellee's track was much congested — George did not deny it and his own witness, Shepherd, testified to the fact. The result of the trial is that George has had for nearly two months the use of the twelve cars and the siding without a cent's compensation, and that the railroad company and the public lost the use of these cars for all that time. What was the railroad to do? Appellee did not want the freight unloaded at any other place; the railroad people expected from day to day that George would do something to settle the matter. We ask again, what was the railroad company to do? It is shown that during the month of December, 1901, 17,500 cars arrived at Meridian from the three roads embraced in one agency, viz.: the A. G. S., the A. & V., and the N. O. & N. E. R. R., and 15,000 in January, 1902; what, under the circumstances, could the railroad company do?

The railroad claims the right to charge demurrage because of certain rules laid down by what is called the Alabama Car Service Association, to which all the railroads in this section

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has committed the matter of demurrage. See the Alabama Car Service Rules and the Mississippi Railroad Commissioners Rules and orders on the subject of demurrage which are in evidence.

It is contended that the railroad company had no right to sell a part of the hulls, that it could only sell each car load for the amount due on the car in which it was loaded. Let us see how fallacious that argument is, and to what an absurdity it would lead. The railroad company has twelve cars, upon each car there is a demurrage of $50. The consignee does not demand any particular car or offer to pay any demurrage accrued on any car. The railroad company, patience exhausted and wanting its cars and the demurrage, proceeds to sell the hulls for the proceeds. How many car loads shall it sell? Must it sell each car load for the amount of demurrage accrued on that car? It says: "No, we will only keep and sell a sufficiency of the hulls to make our money; we think six car loads is enough, and we will release the other six," all the hulls belong to the same person. Can that person be heard to complain and say you must sell all our stuff, you do us a wrong, and you violate the law in releasing any of our cars? You ought to have put up the contents of each car and sold it for the amount due on that particular car. Nonsense. The appellee was benefited by the release of the six cars, for the other six did not bring enough to pay the demurrage.

The right to charge demurrage cannot be questioned at this day even by the common law. 9 Am. & Eng. Enc. Law (2d ed.), 261, and notes. But if no such right exists by the common law, it is given by our railroad commission's rules.

The railroad company in this instance conformed to the commission's rules. Sections 2108-9, Ann. Code of Mississippi.

As to the right to hold the cars until the demurrage should be paid we have no doubt. If the railroads have no such right,

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Brief for appellee.

they are at the mercy of insolvent consignees or would be driven to lawsuits and consequent delays and expenses.

It is admitted that $1.00 per day per car is a reasonable amount to charge.

The court will observe that the charge of "demurrage" as it is called, is not strictly demurrage, which is a maritime term, but more properly a charge for storage, and that the railroad company had the same rights that a warehouseman would have had to withhold delivery until payment of charges; by some of the decisions referred to it is stated that quoad this charge the railroad company ceasing to be a carrier had become a warehouseman.

The charge was for storage, for the use of the cars, and there can be no difference in the rights of the parties when the goods were in a warehouse and when they were stored in the cars.

The bold and patent fact stands out that of his own choice, George allowed his goods to remain in the cars, and that he had the use of the cars for nearly two months, and for that time deprived the appellant of the use of its cars, at a time, too, when there was a car famine.

Shall he pay for such use or damage or shall he wrong the appellant? The jury, we submit, willfully disregarded the testimony and the instructions of the court and found a verdict which has neither law or fact to rest on. *Gulf City C. Co.* v. *L. & N. R. R. Co.*, 25 So. Rep., 579.

Our statute gives the right to warehouses to hold and sell goods not called for. Code 1892, § 2108. And the appellant occupied the position quoad this transaction of warehouseman. *Dixon* v. *Ga. R. R. Co.*, 35 S. E., 369.

Miller & Baskin and *Neville & Wilbourn*, for appellee.

Demurrage charges had not rightfully accrued for the following reasons:

1. Because no legal notice of the arrival of the cars had been given.

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Brief for appellee.

2. Because the cars had never been placed by appellant accessible for unloading at appellee's warehouse or anywhere else and allowed to so remain during the free time, nor had any tender to place them been made by appellant.

3. Because, admitting the general proposition as to the right of carriers to exact charges in the nature of demurrage charges, under proper regulations and circumstances, where consignees are at fault, the right of appellant to make any such charge does not exist, because appellant unlawfully discriminated in the matter of such charges in favor of shippers of cotton, not exacting demurrage charges for the detention of cars loaded with cotton.

4. Because, no matter whether the right to exact such charges exists or not, the carrier is not entitled to any lien therefor, which would authorize the carrier to withhold the product from the consignee, refusing to pay such charges.

There was conflict between witnesses for appellant and appellee on the question of legal notice of the arrival of the cars. Appellee says he got no notice from appellant, though he frankly admits that he knew the cars had arrived.

It was the duty of the appellant to place cars accessible to the appellee's warehouse for unloading. *Vincent* v. *Chicago & Alton,* 49 Ill., 33, cited and approved in *Coe* v. *L. & N. R. R.* Co., 3 Fed. Rep., 775. See also Rules of Mississippi Railroad Commission in record, which are the only rules that are applicable to demurrage charges in this state. Under the facts, appellant failed to show a compliance with its duty, or legal excuse for not doing so, entitling it to charge demurrage, in this case, whatever may be the general law as to the right to charge demurrage in proper cases.

Appellant could not enforce its regulations, nor those of the Mississippi Railroad Commission because of its unlawful discrimination in favor of cotton shippers using its cars and

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Brief for appellee.

tracks. See admirable note on this subject in 41 Am. Dec., 484.

Appellant had no lien upon the product in the cars, whatever may have been the facts of the case.

1. There was no contract, express or implied, for a lien. There was no bill of lading stipulating for it; and the custom and usage between the parties had been almost invariably, according to the testimony, to deliver the product first, and demand demurrage, if any, afterwards. The Car Service Rules had never been promulgated to appellee, and he had never seen them. He had no notice of a claim for a lien, and neither expressly nor impliedly contracted for any.

2. There is no statutory lien for demurrage charges.

3. There could be no lien for demurrage on the six cars previously delivered. Each car was distinct, and as to the six delivered, appellant waived its lien, if it had any, which we deny. 5 Am. & Eng. Enc. Law (2d ed.), 400.

4. Under the better reasoned decisions, and those in which the point was squarely presented, the existence of any lien for demurrage is denied. Hutchinson on Carriers (2d ed.), sec. 474, and notes; *Chicago etc. R. Co.* v. *Jenkins,* 103 Ill., 588; *Burlington etc. R. Co.* v. *Chicago Lumber Co.,* 15 Neb., 390; *Crommelin* v. *New York etc. R. Co.,* 4 Keyes, 90, 1 Jones on Liens, sec. 281-2; *Railroad Co.* v. *Hunt,* 83 Tenn. (Lea), 261; Redfield on Railroads, 206.

There was no lien at common law except to warehousemen; and no lien at all, except upon two conditions: (1) possession, (2) that the charge for which the lien was asserted was for some service or benefit bestowed upon the very thing itself, or that the debt was incurred with respect to the very goods detained. *Friskell* v. *Morris,* 6 L. R. A., 80. If these principles are applied to this demurrage charge it will be seen that no lien can be logically worked out. Let us not be confused in our reasoning by the name given to the charge, by any consideration

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Opinion of the court.

of convenience to either party, or by what it may be argued the law ought to be.

Argued orally by *J. W. Fewell,* for appellant, and by *R. E. Wilbourn,* for appellee.

TRULY, J., delivered the opinion of the court.

This suit involves the determination of the following questions: First, are the rules for the collection of demurrage valid? and, second, if so, how are they to be enforced?

Car service associations are formed by mutual agreement among the railroad companies operating in a stated territory. They owe their existence to the growth of the business interests of the country, the enormous increase in the bulk of through freight handled daily, and the consequent extension of the many railroad systems handling the same. With every increase in the volume of the freight brought into a section from distant markets, hauled, without unloading, over the tracks of many connecting systems of the same gauge, it became more difficult for each carrier to keep track of its own cars. As the cars of each system were handled indiscriminately by every other system, they soon drifted to every quarter, as the current of traffic ebbed or flowed, and their whereabouts were often unknown to the carrier owning them. To correct this evil, car service associations were formed, the primary object of which was to prevent loss by keeping a daily record of every car handled by each carrier, so that each system might receive compensation for the use of its rolling stock, and no unfair advantage be taken by one system over another, and, further, to prevent cars standing idle at one place when needed to meet the traffic demands of another section of the country. These organizations had a beneficial effect, in preventing congestion of empty and idle cars at one point, while a "car famine" prevailed at another. But it soon became apparent that the remedy was not complete. Carriers earn money by the moving of freight. The idle car produces

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no revenue, and the car service associations found that, while it was possible, under its then existing rules, to keep the unloaded cars moving from place to place as necessity might require, they were without power to have the freight promptly unloaded by the consignee, thus securing the car for further service, The merchant who bought goods for sale from his shelves or through his warehouse was ordinarily anxious to receive and unload his freight, but the broker who wished to do a large business with limited or no warehouse facilities found it cheaper and more convenient to use the cars of the carrier for storage purposes, and thus, with no expense to himself, wait a favorable fluctuation of price, when the commodity could be disposed of to advantage, and the car unloaded or rebilled to another place without unloading. To meet this contingency, the demurrage rules in question were formulated and promulgated. It should be noted that the purpose of car service associations was not to make money. They increased the revenue of the contracting carriers only incidentally, in that, by keeping every car in active service, the earning capacity was constantly exerted, and the returns therefrom increased. But the prime object of their formation was to conserve and promote the mutual interest of the carriers and the public dealing with them, by improving the service of the traffic department, and insuring the prompt handling and speedy delivery of freight to the consignee.

It is admitted that the amount charged under the demurrage rules is reasonable, and it appears to us that the rules, so far as applicable to this controversy, in themselves are fair, and based upon that fundamental maxim of justice, "The greatest good to the greatest number." The carrier of freight is responsible in damages if it unreasonably delays the transportation of freight delivered to it, and exact justice demands equal diligence of the consignee. When freight has been transported to its destination and the consignee legally notified of its arrival, it then becomes

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the duty of the consignee to promptly receive the same, so that the car may again be placed in service. These rules work no hardship to the consignee who displays proper diligence in the handling of his freight. Ample time is granted him. But they prevent the dilatory dealers, who seek to save storage or warehouse charges, from keeping the tracks blocked with idle cars; thereby impeding the carriers in the prompt handling of freight, and depriving other dealers of the use of necessary cars to haul their freight or transport the products of the country to market. Certainly no reason, founded in justice, can be given why consignees should not pay for any unreasonable or unnecessary detention of cars. Prompt handling of freight by both carrier and consignee is for the best interests of both, and of the commercial world at large. This question was never before in this court, but this view is in full accord with an almost unbroken line of decisions in other states; and, precedent aside, it is supported by justice and right. *Norfolk & Western R. Co.* v. *Adams,* 90 Va. 393, 18 S. E. 673, 22 L. R. A., 530, 44 Am. St. Rep., 916; *Kentucky Wagon Mfg. Co.* v. *O. & M. Ry. Co.,* 98 Ky., 152, 32 S. W., 595, 36 L. R. A., 850, 56 Am. St. Rep., 326, and cases cited. They have also been approved by various state railroad commissions charged with the duty of guarding the interests of the public. It is well settled that railroad companies may make reasonable rules and regulations, not to limit their own duty or liability, but for the convenient transaction of business between themselves and the shippers of freight over their lines.

Having reached the conclusion that the rules imposing reasonable demurrage charges upon dilatory consignees are fair, just, and enforceable, we now pass to a consideration of the manner of their enforcement. It should be borne in mind that the duty of the railroad company as a carrier of freight terminates, under the decisions of our court, when, the freight having reached its destination in good order, the consignee is legally

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notified of its arrival. After that time the railroad holds as warehouseman and bailee for hire. But in the present case, whether appellant held as carrier, or as warehouseman and special bailee, it was, in either of these capacities, rightfully in possession, and had the right to retain that possession until its legitimate charges were paid. This is a suit in replevin, in which "right of possession" is the only question of law involved. If there was any sum due appellant, whether little or much, the verdict should have been that it retain possession.

It is earnestly insisted that the railroad company has no lien on the freight for demurrage charges either by statute or at common law. It may be true that there is a technical distinction between the lien here claimed and the common-law lien, though the difference is more imaginary than real; but it is undoubtedly true that the warehouseman, as bailee for hire, has a lien for his reasonable charges, and this is recognized as to warehousemen by the express terms of section 2108, Code 1892, in which a lien is given for freight and storage, coupled with a power to sell in a manner therein pointed out. If a carrier has a lien for storage charges if the freight is unloaded into a warehouse, upon what principle can it be denied if, by the action of the consignee, the cars themselves become the storage houses—particularly when, as in this case, the consignee knows in advance, by his course of dealing with the carrier, that the charges will be incurred if he delays in receiving his freight? In our judgment, by necessary implication, the Code chapter on "Freight and Storage" carries with it the necessary lien to enforce the collection of all reasonable charges incident to the handling of freight. In a case of this character, involving the dealings of carrier and public, the courts will not narrowly restrict the meaning of the statute, but will rather "expand the principles of law, and fit them to the exigencies of the occasion," as was aptly phrased by that eminent jurist, Chief Justice Cooper, in discussing a similar proposition. *Telegraph Co.* v.

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Allen, 66 Miss., 555, 6 South., 463. Knowing the rules governing the transaction, the voluntary action of the consignee gives an implied assent to the charge and lien which those rules assert. By the sole action of the consignee, the carrier is forced to retain possession of the freight. By operation of law, it is required to keep, store, and care for the property of another. It is, under the law, entitled to compensation for its services in this connection, and the law gives it a remedy to enforce its rights. In the case of *Wolfe* v. *Crawford,* 54 Miss., 514, our court, in discussing the right of a carrier as a bailee, says: "But the right of the general owner [of the freight] to be restored to the possession is dependent on the payment or tender of the freight and other charges on the goods to the carrier. For these he has a lien, which would be lost if he parted with the possession, and he cannot be compelled to make delivery until they are discharged. The general owner cannot dispossess the carrier of the goods without payment or tender of his legal demands upon them." Again: "But a bailee, until the conditions of the bailment have been accomplished, has a property in the chattels, and a possession which is exclusive, both as to the general owner and strangers. . . . His right and possession extend to the entire property; nor can the bailor, or any one claiming through him, interrupt and defeat his rights until a satisfaction of his claim, or an offer to do so. The common carrier, warehouseman, and all the class of bailees who have a beneficial interest, have a right of possession and a lien in the thing. These rights are inviolable until the acts and purposes for which they were created are performed." In *Miller* v. *Ga. R. Co.* (Ga.), 15 S. E., 316, after stating the general rule that a carrier had a right to collect reasonable storage, the opinion proceeds: "We do not think it material as affecting the right to make a charge of this character, that the goods remain in the cars, instead of being put into a warehouse." 28 Am. & Eng.

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Enc. of Law, 28, p. 663; *Dixon* v. *Central of Ga. Ry. Co.* (Ga.), 35 S. E., 369; *Barker* v. *Brown,* 138 Mass., 340.

There is no force in the argument which concedes the right of the carrier to make demurrage charges, but contends that the goods must be delivered, and then the carrier sue for the amount. This course would give the dishonest and insolvent an unfair advantage, and would breed a multiplicity of suits.

It is contended for appellee that, whatever may be the general rule, in the instant case the appellant should be defeated of its recovery because it failed to bring itself within the rules allowing demurrage, in this: It failed to notify consignee in the manner pointed out, and it failed to tender delivery of the freight as required by the rules of the car service association.

As to the first contention, it is enough to say that the object of the rule was reached, and the law fully complied with, when George was advised of the arrival of the twelve cars, though, if the testimony of Hall, as supported by the entries in his notice book, be true, the rule was literally complied with.

As to the second contention, there is conflict as to the fact. It is true that the cars were not in fact placed in front of George's warehouse, but the testimony does not clearly show that it was the fault of appellant. On the contrary, the testimony of Fewell, the representative of the car service association, and of Lowry, car checker of appellant company, supported by the contemporaneous entries in their record books, if believed by the jury, show conclusively that, during all of the "free time" to which appellee was entitled under the rules, placing in front of George's warehouse was prevented by an accumulation of cars consigned to George himself. This is contradicted by Shepherd, car checker for appellee, while appellee himself testified that "there was no place to deliver them. They had our track full of cotton." With the sharp conflict of testimony on this point, clause "b" of rule 3 must be considered: "The delivery of cars consigned to or ordered to sidings used exclusively by certain

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firms or individuals located on such sidings, shall be considered to have been effected either when such cars have been placed on the sidings designated; or, if such sidings be full, when the road offering the cars would have made delivery had such sidings permitted." It was claimed by appellant that the cars would have been placed on siding on arrival, had the siding permitted. There is much proof that the siding was full. Whether the siding was filled with cars consigned to George or to the cotton compress, in either event appellant was excused from delivering upon the siding. If George had his full quota of cars, then he had no ground of complaint. If the siding was filled with cars for the compress, it had equal right to use of siding, and appellant is not liable. The court correctly instructed the jury on this point by the fifth instruction for defendant, but also gave the second instruction for plaintiff; and, in the light of our conclusions, this was error. By this instruction the jury were told that it devolved upon defendant to prove by a preponderance of the evidence that it notified plaintiff of the arrival of the cars, and placed them on the side track adjacent to plaintiff's warehouse, or "to show circumstances of excuse or justification therefor." This was misleading. By it the determination of certain questions was submitted to the jury, whereas in fact the questions were not in dispute. The jury did not have to pass on the question of notice. George's own testimony leaves no doubt of his knowledge of the arrival of the cars. In the light of the instructions for defendant, the jury were left in doubt as to what was meant by "circumstances of excuse or justification therefor."

To sum up, the sole question of disputed fact involved in this record is: Was the siding so filled with cars consigned to George or to others entitled to the use of the side track, as to prevent the railroad company placing the cars until after the expiration of the "free time?" If so, the railroad was entitled to the verdict. If not, George should recover. Upon this sole question is there

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sufficient conflict to justify the submission of the cause to the jury for determination?

The ingenious but fallacious argument is made that the railroad company should not be permitted to claim the fact, if fact it be, that the siding was full of cars consigned to the compress, as an "excuse or justification" (in the language of the second instruction for plaintiff) for the failure to place the cars in question, because of the unjust favoritism shown the compress company by the railroad company in not charging demurrage on cars loaded with cotton. This is not within the condemnation of the rule. Clause "c," rule 9, prohibits discrimination between persons, and says that, if the car service be collected from one person, it must be collected "of all who are liable." This is to prevent discrimination between persons handling cars loaded with the same class of freight, so that if car service is collected from one dealer handling hulls or flour or grain, or other class of freight, it must be collected from all dealers handling the same class of freight. But in the instant case, car service was collected from no car loaded with cotton or coal, no matter by whom handled, anywhere within the territory covered by the Alabama Car Service Association. It is to be seriously doubted whether under the undisputed testimony of the assistant manager of the Alabama Car Service Association, the carriers have the authority to impose car service on the cars loaded with cotton or coal. We know of no reason why we should condemn as unlawful or unjust the exemption of cars loaded with cotton or coal from car service charges, while many reasons present themselves to commend the equity of the rule. In construing the language of said second instruction, the jury might well have inferred, when considering all the instructions together, that even though the siding was filled with cars for George or the compress, this was no "excuse or justification" for the appellant, because no car serivice was collected of the compress. And this position is not maintainable.

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Opinion of the court.

For the error in giving the second instruction for plaintiff, above referred to, which is in itself erroneous and misleading, and is in conflict with the other instructions for both plaintiff and defendant, the case is reversed and remanded, and a new trial awarded.

As a new trial must be awarded for the error indicated, one further question presents itself for decision. Did the railroad company forfeit its claim for demurrage upon the six cars released by releasing them, or can it hold the remaining six for the charges upon the entire twelve? The twelve cars in question constituted one shipment, belonging to one owner, received at the same time. Further, a different amount of demurrage was due, if any was due, upon four cars, from what was due upon the remaining eight. There was no way to distinguish the four cars from the eight, except by arbitrary selection. The cars were all loaded with the same commodity, loose, in bulk. In 28 Am. & Eng. Enc. of Law, the rule is stated: "The lien [for storage charges] is a right to retain possession of the goods until the satisfaction of the charges imposed upon them. It is specific upon the goods stored for the particular charges for such storage, although the entire lien extends to every parcel of the goods stored at any one time." In *Schmidt* v. *Blood,* 24 Am. Dec., 143, it is said: "A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise intrusted to him at the same time, after a delivery of part, for the storage of the whole." And the same conclusion is reached in *Steinham* v. *Wilkins,* 42 Am. Dec., 254—a thoroughly well reasoned case—and fully supported by citation of numerous authorities. In *Pennsylvania Steel Co.* v. *Ga. R. & Banking Co.,* 94 Ga., 636, 21 S. E., 577, it was decided that a railroad company had the right to retain from each consignment one or more cars to secure itself for the freight and demurrage it claimed on such consignment. And we think this the true and just rule, supported by reason and the more modern decisions. We are un-

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able to see why it should be required of the carrier that it retain twelve cars loaded with the same commodity, belonging to the same owner, when the contents of a fewer number of cars is sufficient to liquidate its charges on all, especially in a case where, as in the instant case, a dispute has arisen as to the validity of the charges claimed, and the consignee is willing to receive the contents of the other cars. As quoted, the conclusion of the Supreme Court of Georgia occurs to us as being the just, sensible, and convenient rule. It avoids the sale of a large amount of freight for the collection of a trifling sum, it saves the consignee the possibility of a loss by the sacrifice of his property at a forced sale, and it gives the carrier the speedy use of its cars for the moving of other freight. We note nothing in the rules under consideration forbidding such action, and it commends itself to us as being the proper course. If the question of fact be decided in favor of appellant, that it is entitled to any demurrage in this case, the six cars retained by it are liable to the charges on the entire twelve constituting the shipment.

For the reasons hereinbefore stated, the case is

Reversed and remanded.

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Brief for appellant.

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POSTAL TELEGRAPH & CABLE COMPANY v. WILLIAM L. WELLS.

1. TELEGRAPH COMPANY. *Error in message. Tort. Sendee's right.*

If a telegraph company receive in another state a message for transmission and delivery to the sendee in this state, and negligently deliver him a different message, to his damage, it will be liable to him in tort therefor.

2. SAME. *Stipulations on back of message. Limiting liability. Constitution* 1890, § 195.

A stipulation on the back of a telegraph message to the effect that the company will not be liable, beyond the charge paid for the transmission, for mistakes in unrepeated messages or errors in transmitting cipher messages, is unavailing as a defense, under Constitution 1890, sec. 195, declaring telegraph companies common carriers in their line of business and subject to liability as such.

3. SAME. *Message received in one state. Delivery in another. Contract. Conflict of laws. Statutes. Common law.*

The rule that the validity of a contract made in one state, for the transmission and delivery of a dispatch in another, is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Shaw* v. *Postal, etc., Co.*, 79 Miss., 670, distinguished.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Wells, appellee, was plaintiff, and the telegraph company, appellant, was defendant in the court below. From a judgment in plaintiff's favor, the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Henry & Scudder, for appellant.

Wells had no contract with the telegraph company. The contract with the telegraph company for the sending of the message, which was changed in transmission, was with Reynolds &

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Brief for appellant.

Company. The contractual relations existed between Reynolds & Company and the telegraph company. If Reynolds & Company sustained loss, it was their province to attempt to hold the telegraph company liable, Wells being the sendee of the telegram, and had no contract with the company and his action must sound alone in tort. But he made no contract to deliver the cotton at 8⅝ with Reynolds & Company, nor did he make a contract or agree to ship it to any one else at 5 5-9. He accepted an offer which was really made at 8½, believing that the offer was for 8⅝, therefore, he accepted an offer which was never made to him. There was no contract between Wells and Reynolds & Company at either 8½ or 8⅝ for the cotton. There being no contract whatever, he has sustained no loss. There is nothing in the evidence to show the value of the cotton at the time of this supposed sale. The damage sustained by Wells, if any at all, must be the difference in price between what he got for his cotton, to wit, 8½, and the value of the cotton, in the open market, at the date of the shipment.

There is no evidence in the record to show the value of the cotton at dates of shipment. The measure of damages, if any, as sustained by Wells is, therefore, the difference of 1-8 of a cent per pound on 100 bales of cotton, which amounts to $60.09, the weight of a commercial bale being 500 pounds, but this is the measure of damages only when Wells has shown that his cotton was worth 1-8 of a cent per pound, above 8½ cents per pound. This Wells has wholly failed to prove. The telegrams sent and received were in cipher, and their contents were known only to Wells and Reynolds & Company. No evidence of their contents or of their importance was called to the notice of the telegraph company. The rule as to cipher messages must therefore apply. It is decided in *Primrose* v. *Western Union Tel. Co.*, 154 U. S., 1, that telegraph companies are not common carriers, or bailees, or subject to the same liability.

2. Carriers of goods may, by contract, restrict the sum for

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Brief for appellant.

which they are liable for negligence. 175 U. S., 98; 85 Fed. Rep., 986; 118 Cal., 690, 62 Minn., 294.

3. Terms on back of sending blank is held part of the contract. 7 S. Dak., 631.

4. Changing of "u" for "a" is only ordinary negligence, and sender can recover only amount paid if message is unrepeated. 103 Mich., 367.

5. Telegraph companies may stipulate against liability beyond cost on unrepeated messages. 63 Fed., 247; 103 Mich., 372; 50 Am. St. Rep., 382; 33 L. R. A., 408; 162 U. S., 663.

6. Telegraph companies may stipulate against liability for mistakes in obscure or cipher messages. *Ib.*

7. Damages for breech of contract are limited to those resulting in the usual course or which parties must have understood as likely to occur. 68 Fed., 140; 11 Col. App., 332; 53 Pac., 253; 23 Ind. App., 25.

8. Telegraph companies are liable on cipher messages of undisclosed importance only for price though known to be to sender's agent. 68 Fed. Rep., 138; 15 Tex. C. I. V. Appeals, 336; 92 Fed., 297; 72 Mo. App., 116; 42 S. C., 368; 46 Am. St. Rep., 735.

It is reasonable to require a repetition of a cipher message at a small extra cost, and the harsh penalty of heavy damages for unintentional error of the peculiar manner in which either the sender of the message or the telegraph operator who writes it out for delivery to the sendee may shape letters should not be imposed. *Shaw* v. *Pos. Tel. Co.,* 79 Miss., 670.

Telegraph companies are not liable for mistakes in unrepeated messages when stipulated against on blank. 190 N. Y., 231; 16 N. E., 75; 1 Metc. (Ky.), 164; 71 Am. Dec., 461.

Where blank limits liability company is not liable for error at other end of line. 13 Allen, 226; 1 Metc. (Ky.), 164; 37 Mo., 472.

Shingleur v. *Tel Co.,* 72 Miss., 1030, decides that sendee

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Brief for appellee.

cannot hold sender liable for a telegram materially changed in transmission if sender knows before he delivers cotton of error he may refuse delivery. If, however, he makes delivery seeking to hold up his business credit he cannot recover of telegraph company for his loss. *Shaw* v. *Postal Tel. Co.*, 79 Miss., 670, holds the validity of a contract is governed by law of state from which sent if message goes into another state.

Smith, Hirsh & Landau, for appellee.

Reynolds & Company were the agents of Wells; the contract made with the telegraph company was Wells' contract and not Reynolds' contract, and, moreover, if Wells sustained any damage as sendee of the message, he is entitled to recover. *W. U. Tel Co.* v. *Allen,* 66 Miss., 549.

At the time this suit was instituted, the question whether or not a telegraph company was liable on an unrepeated cipher message was an open one in this state, and some courts had taken the view that they were and others that they were not; since that time this court has adopted the view that they are liable. See *Shingleur* v. *Tel. Co.*, 72 Miss., 1030.

We quote from the dissenting opinion of Judge Whitfield in *Shaw* v. *Cable Co.*, 79 Miss., 696, as follows:

"It (*Shingleur* v. *Telegraph Co.*), also distinctly holds that the telegraph company is liable in case of a cipher message, and cannot make a valid rule exempting itself from liability in case of unrepeated message. These views are reaffirmed."

The *Shingleur Case* distinctly holds that Shingleur would have been entitled to recover had it not been for his admission that he was not bound to deliver the cotton, and, further, that he delivered the cotton notwithstanding this, and after he found out the mistake.

Shaw v. *Cable Company,* 79 Miss., 570, distinctly places the doctrine that is announced on the statute of the state of Massachusetts, and as there is no such statute in Rhode Island, the doctrine invoked is not applicable. This court has held that

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Opinion of the court.

telegraph companies are liable for mistakes in transmission of cipher messages under the common law.

TRULY, J., delivered the opinion of the court.

On the 15th day of October, 1892, appellee, under the style of W. L. Wells & Co., was engaged in the cotton brokerage business in the city of Vicksburg, this state. He had representatives and sales agents in various places, who would obtain offers for cotton from spinners and cotton mills, and transmit the same to appellee; and, upon acceptance of offer by appellee, the said representative and sales agent would close the trade at the price and for the number of bales agreed on. Among other representatives, appellee had employed F. W. Reynolds & Co., of Providence, R. I. On said date (15th October) Reynolds & Co. sent appellee a cipher telegram, stating an offer received by them for 1,000 bales of cotton at 8½ cents per pound; the price being signified by the cipher word "alike." By the negligence of the employee of appellant, the word signifying the price was erroneously transcribed "alive," which word, in the cipher code in use, meant 8⅝ cents per pound, so that the offer, as it reached appellee, was for 1,000 bales of cotton at 8⅝ cents per pound. Appellee accepted the offer as it reached him, to the extent of 500 bales, and so wired his sales agents, Reynolds & Co. Immediately upon receipt of the acceptance of the offer by appellee, Reynolds & Co. closed the trade with the purchaser, and executed a sale note for 500 bales at 8½ cents per pound, being the figure at which they had transmitted the offer to appellee; both Wells and Reynolds being ignorant of the error committed by the telegraph company in transcribing the message. Subsequently the error was discovered, through the refusal of the purchaser to pay more than 8½ cents per pound, the price at which the sale had been consummated. Thereupon W. L. Wells filed his claim in writing within 60 days, and, this not being paid, brought suit against the Postal Telegraph and Cable Com-

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Opinion of the court.

pany for $304.89, being one-eigth cent per pound on 500 bales; charging that this damage was caused by the negligence of the telegraph company in erroneously transcribing the message from Reynolds & Co. Defendant pleaded the general issue, and gave notice that at the trial it would offer evidence to prove that it was not liable in damages, because of the conditions upon which the message had been sent, as printed upon the blanks used by the defendant company, by which the telegraph company undertook to limit its liability in case of mistake in the transmission of any "unrepeated messages" to the amount paid for its sending, or "for errors in cipher or obscure messages." Upon the trial an "agreed statement of facts" was filed, in which the facts herein stated were recited. It was further agreed that the message in question was sent upon one of the blanks containing the stipulations of nonliability; that it was an unrepeated message; that it was in cipher, and its meaning known only to plaintiff, Wells, and his agents, Reynolds & Co. Said agreed statement further recited "(5) that, at the time plaintiff discovered the fact that a mistake had been made in the telegram, he had shipped 250 bales of cotton, in compliance with said contract," and "(8) if the court shall be of the opinion that the plaintiff is entitled to recover, then judgment is to be rendered in favor of plaintiff for $304.89, with the interest from October 15, 1892, and all costs." The only other testimony was the deposition of Reynolds, showing the telegram as originally sent, and proving the sale and execution of the sale note at 8½ cents per pound. Judgment was rendered by the court in favor of plaintiff, and the Postal Telegraph & Cable Company appeals.

Admitting the error in the transmission and transcribing of the message in question, counsel for appellant contend that in the instant case the telegraph company is not liable:

1. Because this message was sent from the state of Rhode Island into this state, and therefore the law of Rhode Island

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governs, and appellee must be defeated of his recovery under the rule announced in *Shaw* v. *Cable Co.*, 79 Miss., 670, 31 South., 222, 56 L. R. A., 486, 89 Am. St. Rep., 666. Upon consideration, this argument will be found manifestly unsound. This case is easily differentiated from the *Shaw Case*. In that case (also involving a cipher message) the decision of the court is expressly founded upon a statute of Massachusetts allowing telegraph companies to affix certain "regulations" to their handling of telegrams. Rhode Island has no such statute, and the *Shaw Case* recognizes the common-law rule of liability in the absence of statute expressly abrogating it. Again, in this case Wells was the sendee of the message, and is suing, not on contract, but in tort, for damages caused by the delivery to him of a telegram erroneously and negligently transcribed. The duty of the telegraph company, and the rights of the sendee of a telegram, and the sound reasons supporting those rights, are forcibly, clearly, and unanswerably stated by Cooper, J., in the case of *Telegraph Co.* v. *Allen*, 66 Miss., 549, 6 South., 461. Under the facts presented by this record, this is a suit for a tort committed in Mississippi, and is properly brought in a Mississippi court.

2. It is also contended that the telegraph company cannot be held in damages, because of the stipulations on the back of the message, constituting the conditions under which the message was received by the company. The stipulations to which reference is mainly had are that the company is not liable, beyond toll paid it, for mistakes in unrepeated messages, and is not liable in any case for errors in transmitting cipher messages; it being shown that the message under consideration herein is both an "unrepeated" and a "cipher" message. It is undoubtedly true, as shown by the long list of authorities cited in brief for appellant, that the courts of several states have held that telegraph companies might limit their liabilities and restrict the sum for which they would be liable for their own negligence.

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Opinion of the court.

In the decision of this question, of such importance as the relative rights of the telegraph companies, on the one hand, and of the business world, upon the other, while giving due consideration to the decisions of other tribunals, we must look to our own court, and, in the absence of express declaration by it, solve the question in the light of our own public policy, and announce such rule as will, under the law, best conserve the rights of all concerned. Today many of the more important business transactions of the world depend for their successful consummation upon the accuracy and promptness with which the telegraph companies transmit and deliver the messages delivered to them —upon the fidelity with which they discharge the duties to the public imposed upon them by the law. It is of the utmost importance, therefore, that there should be a clear and definite understanding of the relative duties, rights, and remedies. Prior to the passage of our present constitution, in 1890, the question of the power of the telegraph companies to limit their liability for their own negligence was in doubt to this extent at least: Our supreme court had never definitely decided this precise point. The *Alexander Case,* 66 Miss., 161, 5 South., 397, 3 L. R. A., 71, 14 Am. St. Rep., 556, had, by implication, necessarily negatived this contention, for, if the compeny could have availed itself of this stipulation, the plaintiff would have had no legal cause of action. But the adoption of section 195, Const. 1890, in our judgment, removes all doubt as to what the true rule is in Mississippi. Section 195 declares that "telegraph companies are common carriers in their respective lines of business, and subject to liabilities as such." As common carriers, under the common law, any stipulation to exempt themselves from liability for their own negligence would be void, and the supreme court of this state has always held that no common carrier can restrict by contract the consequence of its own wrongdoing; the rule being based upon the sound reason that, as common carriers, dealing with the public, they are charged with certain

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Suggestion of error.

duties to the public, which they cannot violate without being liable to respond in a full measure of damages therefor. Public policy, the safety of those with whom they deal, the protection of the property rights of the public, all require a degree of liability commensurate with the magnitude of the public interests involved. The stipulations of the telegraph company here under consideration are simply an effort to contract for protection against the effect of its own wrongdoing—an attempt to limit its liability for its own negligence—and, as such, are invalid, as being opposed to public policy. The fact that the telegram in question was a cipher message cannot vary the rule above stated. This very point was necessarily involved in the decision of this court in the case of *Shingleur* v. *Telegraph Co.*, 72 Miss., 1030, 18 South., 425, 30 L. R. A., 444, 48 Am. St. Rep., 604. In that case, as in this, the negligence was in erroneously transcribing a "cipher message," and the general rule of the liability of the telegraph company was recognized and upheld, but recovery was denied because plaintiff had no right of action under the proven facts. That case rightly decided that, when one on whom no legal liability is imposed recognizes a moral obligation, and voluntarily discharges it, he cannot, by so doing, impose a legal liability upon another. Says the court in the *Shingleur Case*: "Shingleur had shipped no goods, had incurred no liability." In the instant case the agreed statement shows that 250 bales had been shipped before the discovery of the mistake. This, under the true interpretation of the *Shingleur Case,* is decisive of the right of plaintiff to recover something, and the amount of recovery was as fixed by agreement of parties.

The judgment is affirmed.

After the delivery of the foregoing opinion, *Frank Johnston* and *J. R. McIntosh,* for appellant, filed a suggestion of error, making the following points:

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Suggestion of error.

The opinion in this case states, "This case is easily differentiated from the *Shaw Case*. In that case (also involving a cipher message) the decision of the court is expressly founded upon a statute of Massachusetts allowing telegraph companies to affix certain "regulations" to their handling of telegrams. Rhode Island has no such statute, and the *Shaw Case* recognizes the common-law rule of liability in the absence of statute expressly abrogating it." The court falls into an error. It is not because the statute of Massachusetts allows it, that the contract is valid. The state of Massachusetts cannot prevent the telegraph company from making the contract on interstate commerce. This precise point has been decided by the supreme court of the United States. "It is of course elementary that where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress by general legislation, has undertaken to govern the subject." *R. & A. Railroad Co.* v. *Patterson Co.*, 169 U. S., 314. This rings clear. *Missouri Pac. Ry. Co.* v. *Sherwood*, 19 S. W. Rep., 455; *Galveston, H. & S. R. Co.* v. *Armstrong*, 43 S. W. Rep., 614; *Primrose* v. *W. U. Tel. Co.*, 154 U. S., 1 Miller on the Constitution, 481; *Wabash, St. L., etc., R. Co.* v. *Illinois*, 118 U. S., 557; *Hall* v. *DeCuir*, 95 U. S., 485; *Hart* v. *Penn. R. Co.*, 112 U. S., 331; *M. K. & T. R. Co.* v. *McCann*, 174 U. S., 586; *M. K. & T. R. Co.* v. *Elliott*, 184 U. S., 534.

The court states that Wells is suing in tort. There was no tort committed by the telegraph company.

The telegraph company did all that it promised and agreed to do. The parties to the contract in their argument shut out

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Suggestion of error.

errors in cipher messages as constituting a breach of the contract.

If any tort was committed upon Wells, it was by the sender of the message, in using the method of transportation he did, in not having his telegram repeated, in writing his message in cipher, and in entering into the agreement he did, providing against liability for error in cipher messages. The telegraph company acted as the sender's agent, and did all that the two agreed upon, and the tort, if any, must have been that of the telegraph company's principal.

This court is in error in applying the Mississippi Constitution as to common carriers in this case. The section of the Mississippi Constitution which declares that "telegraph companies are common carriers in their respective lines of business, and subject to liabilities as such" is invalid as to interstate commerce, because it is in conflict with the provision of the constitution of the United States, which gives to congress the power to regulate interstate commerce "in so far as any provisions of a state constitution conflicts with the United States Constitution it is invalid." Joyce on Electric Law, sec. 141; *New Orleans Gas Light Co.* v. *Louisiana etc. Co.,* 115 U. S., 672; *Dodge* v. *Woolsey,* 18 How. (U. S.), 331; Miller on Constitution, 643; *Head Money Cases,* 112 U. S., 580; *Wabash etc.* v. *Illinois,* 118 U. S., 557; *Primrose* v. *W. U. Tel. Co.,* 154 U. S., 1.

This court is in error as to all three propositions:

1. That the state of Rhode Island has to "allow" the telegraph companies by statute to make the contract on interstate messages to validate it.

2. That the telegraph company is liable in tort.

3. That the Mississippi Constitution applies.

[*The suggestion of error was overruled.*]

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Statement of the case.

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RUFUS R. ELKIN ET AL. *v.* JOSEPH E. RIVES.

DEED OF TRUST. *Sale under. Trustee's compensation. Attorney's fees.*

If a deed of trust be enforced by the trustee making sale of the property, he is entitled to retain from the proceeds for his services only a reasonable compensation to himself as trustee, although the note evidencing the debt secured by the deed stipulates for the payment of an attorney's fee in case it be collected by an attorney and the trustee is an attorney and a member of a firm of attorneys to whom the payee intrusted the note for collection.

FROM the circuit court of Noxubee county.

HON GUION Q. HALL, Judge.

Elkin and another, appellants, were plaintiffs in the court below; Rives, appellee, was defendant there. From a judgment in defendant's favor, plaintiff's appealed to the supreme court. In 1900, appellants borrowed $1,000 from one Cooper, and, to secure same, gave a deed of trust on some property. They also gave their note payable in one year from date. The note provided that "if not paid at maturity and collected by an attorney, or by legal proceedings an additional sum of ten per cent on the amount of this note shall be paid as attorney's fee." Appellee, Rives, who is an attorney, was trustee in the deed of trust given by appellants. The note was not paid when due, and Cooper placed it in the hands of Rives & Brooks, attorneys, for collection. Rives, the trustee, was a member of this firm. The money not being paid on request of these attorneys, Rives, as trustee, advertised the property for sale, and it was sold under the trust deed to pay this note. He retained the ten per centum provided for in the note as attorney's fee for its collection, making no charge as trustee. The sale produced more than sufficient funds to pay the note. Appellants brought

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Brief for appellants.

this suit to recover of appellee the sum thus retained. A peremptory charge was given for defendant in the court below.

Gulley & Kennedy, for appellants.

It has been settled long ago that if a trustee is also an attorney for the *cestui que* trust, he can make no charges against the trust estate for any service rendered in a professional capacity. This rule is so strict that even if the trustee has a partner, he cannot claim compensation. 1 Perry on Trusts (3d ed.), sec. 432, and authorities.

26 Am. & Eng. Law (1st ed.), 877, 878, shows that the principle which governs the conduct and fixes the responsibility of trustees generally, apply with full force to trustees with power to sell for the payment of debts.

In Alabama it has been decided: "Where a mortgage containing a power of sale stipulates that the proceeds of sale shall be applied, first, to paying the expenses; and all attorney's or solicitor's fees, and the notes secured by the mortgage provided that, in case they are not paid at maturity, the mortgagor shall pay not less than ten per cent for collecting them, the mortgagee cannot retain ten per cent out of the proceeds of the sale under the power, but is entitled to a reasonable attorney's fee only, since the stipulations in the notes and the mortgage in relation to attorney's fees are independent, and applicable to different contingencies — one to the sale under the mortgage, the other to collection of the notes by suit," and the decision is on all fours with the case at bar, with the exception that in the Alabama case, the mortgage itself also had a provision for attorney's fees, while in the case at bar, there is no provision in the trust deed for attorneys' fees. *Tompkins* v. *Drennan,* 10 So. Rep., 638.

Many cases hold that where a trustee needs the advice or assistance of an attorney in his work as trustee, he will be allowed a reasonable sum for attorneys fees. These cases do

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not touch the question now before the court. If the appellee as trustee had needed an attorney in performing his duties as trustee, the fee for such service would have been a legitimate charge against the appellants, but in the case at bar no such services of an attorney were needed and none rendered.

J. E. Rives, pro se.

There can be no question that the note was put in the hands of Rives & Brooks, attorneys at law, for collection. That fact is testified to by appellee, and not denied by appellant; and as attorneys, they had the right to enforce the payment of that note and trust deed either by having the trustee foreclose the same *in pais,* or by filing bill in the chancery court. The fact that they took the shorter course which was of less expense to the appellants in this case would give them no good ground for complaint. That a stipulation in a note and trust deed for an attorney's fee is valid has been heretofore well settled by this honorable court in the cases of *Duggan* v. *Champlin,* 75 Miss., 441; *Brahan* v. *Bank,* 72 Miss., 266; *Millsaps* v. *Chapman,* 76 Miss., 942.

WHITFIELD, C. J., delivered the opinion of the court.

In those cases in which a dry, naked trustee has been allowed attorneys fees for services, such as *Lowries appeal,* 1 Grant, Cas. 373, and *Babcock* v. *Hubbard,* 56 Conn., 284, 15 Atl. 791, the professional services have usually been rendered in litigating cases or in conducting suits. In both the cases referred to, the trustee had been employed as attorney before he acted as trustee, and was a mere holder of legal title. In all the other cases that we have been able to find, trustees have been denied compensation for professional services. See Underwood & Hill on Trusts & Trustees, p. 317, note 1, and the authorities cited at the foot of p. 318. Ordinarily what takes place in execution of the power of sale by the trustee *in pais* would not require anything more than action by the trustee as such.

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Statement of the case.

True, suit might be brought to foreclose in chancery. The personal liability on the note might also be enforced by suit. But as well stated in *Thompkins* v. *Drennan* (Ala.), 10 South., 638, "there is an independent field of operation" in the exercise of the power of sale, and in the exercise of the right to sue on the note. Looking at what was done here, we think the appellee should be limited to reasonable compensation as a trustee.

Reversed and remanded.

WILLIAM BALL ET AL. v. EDWARD SLEDGE.

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1. JUSTICE'S COURT. *Appeal. Jurisdiction. Circuit court. Code* 1892, §§ 83, 84.

A circuit court has no jurisdiction of a suit begun before a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. Code 1892, §§ 83, 84.

2. SAME. *Supreme court.*

The supreme court has no jurisdiction of a case begun in the court of a justice of the peace, unless the circuit court had jurisdiction.

FROM the circuit court of Bolivar county.

HON. A. McC. KIMBROUGH, Judge.

Ball and another, appellants, were plaintiffs, and Sledge, appellee was defendant in the court below. The case was begun in a justice's court. From a judgment in defendant's favor the plaintiffs appealed to the supreme court. The state of the record, on which the case turned, is shown by the opinion of the court.

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Opinion of the court.

Moore & Clark, for appellants.

Sillers & Owen, for appellee.

TRULY, J., delivered the opinion of the court.

This is a suit instituted by appellants in a justice of the peace court, and, so far as this record shows, the case was never tried or decided by the justice of the peace. There is no judgment of the justice of the peace, no bond for appeal to the circuit court, nothing to show a final determination in the court where the case was first tried. Sections 83 and 84 of the Code of 1892 state what is necessary to be done in causes originating before a justice of the peace and appealed to the circuit court. Under the facts disclosed by this record, the circuit court had no jurisdiction, and therefore this court has none, and we are forced to dismiss the appeal. Appellants may, if they can, perfect their appeal by certiorari, whereupon we will reinstate the case, conditioned that the appellants shall pay the costs of the appeal in this court. See *Gardner* v. *R. R. Co.,* 78 Miss., 640, 29 South., 469, and cases there cited.

*Appeal dismissed, but with privilege of reinstatement on terms indicated.**

* The case was reinstated and afterwards decided on its merits. See next case in these reports.

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Statement of the case.

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WILLIAM BALL ET AL. v. EDWARD SLEDGE.

1. REPLEVIN. *Jurisdiction. Value of property. Code* 1892, § 3707.

The affidavit, required by Code 1892, § 3707 as the basis of an action of replevin, determines the jurisdiction of the court so far as it concerns the value of the property sued for, unless the plaintiff knowingly undervalued or overvalued it for jurisdictional purposes.

2. SAME. *Code* 1892, § 629.

Code 1892, § 649, providing a penalty for suing for more than is due for jurisdictional purposes, applies to justices' courts. Code 1892, § 629.

3. LANDLORD AND TENANT. *Agricultural products. Lien. Purchaser. Notice.*

A landlord has a lien to secure his rent and supplies for the current year on all the agricultural products raised on the leased premises, and he may assert the same against the products or the purchaser, with or without notice, of such products.

4. SAME. *Products out of State.*

The lien of the landlord does not follow agricultural products when carried out of this state, and the purchaser who acquires them out of this state is not liable to the landlord, although he had notice of the lien while they were in this state.

5. DEBTOR AND CREDITOR. *Payment in property subject to lien. Receipt. Enforcement of lien. Renewal of debt.*

A creditor who receives in this state in payment of his debt cotton upon which a third person has a landlord's lien may enforce repayment from the debtor, if the property or its proceeds be taken from him by the enforcement of the lien, although he had executed a receipt in full upon receiving the cotton. He cannot do so, however, if he received the cotton out of the state.

FROM the circuit court of Bolivar county.

HON. A. MCC. KIMBROUGH, Judge.

Ball and others, appellants, doing business under the name of Ball, Brown & Co., were plaintiffs in the court below; Sledge, appellee, was defendant there.

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Statement of the case.

Sledge, appellee, rented lands in this state from one Williamson for the year 1900. He afterwards gave a deed of trust to Ball and others, appellants, on his crop, some live stock and his farming implements, to secure advances made by them to him for that year. Ball and others, appellants, were merchants doing business in Memphis, Tenn. Appellants had actual notice of the rental contract between Williamson and Sledge, and paid Williamson $150 of the rent for the year. Sledge did not pay appellants, and early in the year 1901 they sent their agent to see Sledge, and gave him the amount he owned them, which was $295 on account, and the $150 they had paid on the rent for 1900. The agent went to see Sledge, and urged the payment of the debt; and Sledge agreed that two bales of cotton raised on the land rented from Williamson and two mules might be sold by this agent, and the proceeds applied to the payment of said debt. The agent sold the property, and applied the proceeds to the payment of the open account, for the time forgetting the amount that had been paid on the rent, and paid a small balance in money to Sledge, and gave him a receipt in full of the amount due to appellants. This mistake was afterwards discovered, and not getting satisfaction from Sledge, appellants brought this action of replevin under their deed of trust to recover from Sledge three horses and the farming implements covered by the deed of trust. The affidavit fixed the aggregate value of the property at $145, and the return of the officer on the writ fixed it at $132. The suit was brought in a justice of the peace court, and from a judgment for defendant plaintiffs appealed to the circuit court. There was considerable testimony taken as to the value of the property seized, some witnesses fixing it at more, and some less, than $200.

The first and second instructions given for defendant in the circuit court are as follows:

"(1) If the jury believe from the evidence that the value of

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Statement of the case.

the property replevied in this suit exceeded the sum of $200 at the time suit was instituted, they must find for defendant."

"(2) The court instructs the jury that the rent note paid by plaintiffs is not covered by the deed of trust, and if they find from the evidence that the defendant, Sledge, paid in full all indebtedness due plaintiffs, except said rent note, they must find for defendant."

The second and third instructions refused for plaintiffs are as follows:

"(2) The court instructs the jury that if they believe from the evidence that in January, 1901, the plaintiffs, through their agent, Green, received from Sledge, in this county, two bales of cotton which were subject to an unsatisfied landlord's lien held by Williamson, and that the plaintiffs, in this county, appropriated the said two bales of cotton, and the proceeds thereof, selling the same, and placing the proceeds to the credit of the defendant in account, then they were liable to the owner of the rent note offered in evidence for the value of the said cotton; and, if the plaintiffs were so liable, then the defendant became liable for such value, and such liability is protected by the mortgage offered in evidence, and the jury will find for the plaintiffs, unless they believe that such liability, if any, has been discharged by the defendant.

"(3) If the jury believe from the evidence that defendant shipped to plaintiffs, in Memphis, Tenn., cotton raised on land rented in 1900 by the said defenadnt from Williamson, and that such shipment was made because of the demand of plaintiffs, or by reason of defendant's contract and agreement with plaintiffs, and that such cotton so shipped was subject to landlord's lien held by Williamson, and that plaintiffs had actual knowledge then of said lien, and that such landlord's lien has been satisfied and discharged by plaintiffs, because of their liability for same, then the jury will find for plaintiffs, unless they further believe from the evidence that the said defendant

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Brief for appellants.

has fully paid and satisfied the amount so paid by the plaintiffs in discharging the landlord's lien."

From a verdict and judgment for defendant, plaintiffs appealed to the supreme court.

Moore & Clark, for appellants.

The court below erred in refusing to give the second and third instructions asked by plaintiffs. It is shown and admitted by appellee that appellants had received from appellee cotton liable to Williamson's rent lien, having actual notice of said lien; and also, on January 23, 1901, received and appropriated, in Bolivar county, Mississippi, and on the leased premises, two bales of cotton, subject to said unsatisfied lien. Because of such receipt and appropriation appellants were compelled to pay Williamson, from the proceeds of said cotton, one hundred and fifty dollars on his rent claim, and such payment *pro tanto* reduced the credits to which appellee was entitled. Appellee, after deducting the rent payment, $150, from credit in account, was justly indebted to appellants, as balance due on his note, in the sum of $445.80 instead of $295.80 — the amount actually paid.

It is abundantly shown, and virtually admitted by appellee, that Green, the agent of appellants, overlooked the $150 rent item and made mistake in giving receipt in full, when he had positive instructions to collect both the balance due on account of money, etc., furnished appellee, and also the $150 rental paid Williamson, and when he thought, at the time of the execution of said receipt, that he had collected all that appellee owed his principal, both on account, notes or for rental paid.

If it be possible that we are wrong in the foregoing, then it cannot be denied that the court committed a fatal error in giving the second instruction asked by appellee. This second instruction given at the request of appellee amounted virtually to a peremptory instruction to find for appellee, notwithstand-

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Brief for appellee.

ing the fact that the item of indebtedness therein referred to was expressly, frankly, and freely admitted by appellee, and was expressly secured by the terms of the trust deed and under which replevin was sued out.

By the terms of that instruction, the jury was told, virtually, that the value of the property levied upon need not be considered — that the item of indebtedness claimed was not secured by the trust deed, and that verdict must be returned for the defendant. Certainly a strange and unwarranted construction of the written contract, a fatal error which this court will hasten to correct.

Upon the question as to the jurisdiction of the court, we deem it necessary only to call attention to the principle announced by this court in the case of *Stephen* v. *Eiseman,* 54 Miss., 535. "The test of jurisdiction is the value of the property as stated in the affidavit and demanded in the pleadings, subject to be defeated if an attempt to evade the constitutional limitation be shown. When the affidavit and declaration avers that the value is $165, but a verdict in favor of the plaintiff fixes it at only $150, and there is no evidence of a purpose to evade the jurisdiction, the judgment is good.

This was the established doctrine under the old constitution, which gave jurisdiction in the magistrate's courts to $150, but the same principle applies in settling the question of jurisdiction under the present constitution which has extended the jurisdiction of magistrates to $200.

The record here does not disclose any purpose whatever to evade the jurisdiction of the magistrate's court, but on the contrary, it affirmatively shows a *bona fide* reason on the part of the plaintiffs through the evidence of its witnesses that the value of the property in controversy was within the magistrate's jurisdiction.

Sillers & Owen, for appellee.

Verdict of jury and judgment of court is correct and proper.

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Opinion of the court.

The proof shows that the case was brought in magistrate's court. The value of the property is shown to have exceeded $200, and is above the jurisdiction of the court in which the suit was brought.

Instructions Nos. 2 and 3 asked by the plaintiff were properly refused by the court. The evidence shows that the balance of the rent due, if any was due, was not paid by appellants until after a settlement in full of the mortgage debt due by Sledge to appellants and the account could not at that date be opened and the debt made a charge on the live stock covered by the mortgage, even if the same would have otherwise been a valid charge on the mortgage account, which it was not.

The assignee of the rent note would have a lien on the crops on the land, but the rent would not, unless paid at the instance of Sledge, become a part of the mortgage debt, and a lien on the live stock. The mortgage debt being paid in full, as shown by the receipt, the deed of trust was satisfied and a lien on the live stock and right of possession in trustee or mortgagee was gone.

TRULY, J., delivered the opinion of the court.

The first instruction given for appellee told the jury that, if they believed from the evidence that the value of the property involved exceeded $200 at the date of the institution of the suit, they should find for the defendant. This was fatal error. Section 3707, Code 1892, stating how the action of replevin shall be commenced, wrought a radical change in section 2613, the corresponding section of the Code of 1880. This amendment and enlargement was intended to provide an easy plan by which the rights of parties litigant might be speedily and finally determined. The rigidity of the technical rules in matters of procedure was relaxed, and a simple method devised for the commencement of the action. Under section 3707, the plaintiff files an affidavit in statutory form, stating therein the residence

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of the defendant, the location of the property, and his valuation thereof, whereupon the officer taking the affidavit makes the writ returnable to the proper court, whether of his own or another county. The venue is fixed by the residence of the defendant or location of property, and the jurisdiction by the value of the property, as these are set out in the affidavit; and the jurisdiction of the court, thus fixed, can only be defeated by proving a different venue, or by showing that a false valuation of the property was made on "purpose to confer jurisdiction." On this point, section 649, Code 1892, applies to justice of the peace as well as circuit courts. It is true, as decided in *Biddle* v. *Paine,* 74 Miss., 494, 21 South., 250, that the value of the property is the test of jurisdiction in actions of replevin; but, as value is only a question of estimation, varying as the individual judgments of men may differ, the valuation fixed by the pleadings is primarily accepted as true. It is also true that the jurisdiction of the court thus acquired may be defeated, and the plaintiff nonsuited in consequence; but, in order to do this, conflicting testimony as to the value of the property involved is not sufficient. The proof must go further, and show that the valuation was knowingly and purposely falsely magnified or diminished in order to avoid the constitutional limitations of jurisdiction. Any other rule, as pointed out in *Fenn* v. *Harrington,* 54 Miss., 733, would work hardship to the litigant who honestly over or under estimates the value of the property involved, or whose valuation differed from that of other witnesses, or from the conclusion arrived at by the justice of the peace or the jury. The jurisdiction of the courts was not intended to be left as a matter of conjecture, to be acquired, and liable to be defeated, by honest differences upon a mere matter of opinion. This rule was not correctly stated by the first instruction for the appellee. The jurisdiction of the court was not dependent upon what conclusions as to value the jury might arrive at from the proof on the trial in the circuit court, and the

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question of value was not for the consideration of the jury in this connection. If it should become manifest durnig the progress of a trial that a court, for any cause, was without jurisdiction, the presiding judge should so decide, and dismiss the case. The question was, not what the jury believed the property to be worth, but, did the appellants knowingly underestimate the value for the purpose of vesting the justice of the peace with jurisdiction? In this view, there was no testimony which warranted the giving of this instruction.

The second instruction given for appellee was also erroneous. It is well settled that the landlord has a prime lien on all the agricultural products raised on the leased premises, to secure his rent and supplies for the current year; and this lien may be successfully asserted, not only on the products themselves, but against the purchaser thereof, in this state, whether with or without notice of the existence of the lien. In the instant case it is admitted that appellants had actual notice of the relation of landlord and tenant which existed between appellee, as tenant, and Williamson, as landlord. Consequently the landlord could have legally asserted his lien for rent in arrears against appellants for the value of all cotton produced on the leased premises, received by them in this state from the tenant. The sole question for consideration, therefore, was what amount, if any, was legally due by appellee to his landlord, Williamson, on his rent note. Whatever this amount, appellants were liable therefor, to the extent of the value of the cotton received by them in this state; and, having paid it, they could rightfully subtract it from the net proceeds of the cotton which they had credited on Sledge's indebtedness to them, and proceed to collect the balance then due them as provided by the terms of the deed of trust which they hold. The fact that the agent of appellants had, through mistake, given appellee a full receipt, and had canceled and surrendered the trust deed, did not alter the legal status of affairs. One who receives cotton

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Opinion of the court.

from a debtor, and applies the proceeds thereof to the satisfaction of an existing indebtedness, and gives receipts therefor, if afterwards forced to pay such proceeds to one holding a paramount lien on the cotton, is not deprived of his right to demand and enforce repayment from his debtor. The property in controversy is subject to the trust deed of appellants for whatever amount was legally due Williamson by Sledge as rent, and which was paid by appellants out of the cotton liable therefor.

The second instruction refused for appellants correctly stated the law herein announced, and it should have been given.

The third instruction asked by appellants was correctly refused. It was decided in *Millsaps* v. *Tate,* 75 Miss., 150, 21 South., 663, upon a case strikingly similar to the one here presented, that the lien granted landlords by our law did not attach to cotton shipped out of the state, and the purchaser was not liable, even where he had actual notice of the existence of the lien. The fact that appellants paid the landlord a portion of the proceeds of cotton received beyond the confines of the state does not alter the controlling legal principle. The record does not show that the payment was made by the direction of the tenant, and appellants in this case are not asserting any rights as assignees of the landlord.

Upon the record here presented, the measure of appellants' rights is the amount of rent, if any, due Williamson by Sledge, and paid by appellants, to the value of the cotton received by them in this state.

Reversed and remanded.

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Statement of the case.

MERIDIAN LAND AND INDUSTRIAL COMPANY v. JAMES B. ORMOND ET AL.

BUSINESS SIGN. *Code* 1892, § 4234. *Undisclosed principal. Absence of sign. Insurance policy. Garnishment.*

Code 1892, § 4234, provides that, if a person shall transact business, as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read placed conspicuously at the place of business; or if any person shall transact business in his own name without any such addition, all the property used or acquired in such business shall be liable for the debts of the person so transacting the business; and under this statute.

(*a*) Where a mercantile busines was conducted under the name "Ormond Grocery Company," without a sign disclosing the real owner, the property used and acquired therein is subject to the debts of the party transacting the business, although in so doing he was in truth the agent of an undisclosed principal; and,

(*b*) The proceeds of a policy of fire insurance on goods acquired and used in such business and burned while in such use is liable to the creditors of the party who transacted such business, and may be garnished by them.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

The Meridian Land and Industrial Company, appellant, was plaintiff in the court below; James B. Ormond, one of the appellees was original defendant there, and his mother, Mrs. Eliza J. Ormond, the other appellee, was claimant. From a judgment in favor of appellees the plaintiff appealed to the supreme court. The facts are fully stated in the opinion of the court.

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Brief for appellant.

F. V. Brahan and *Woods, Fewell & Fewell,* for appellant.

If we concede for the sake of argument that the business actually belonged to the appellee, Mrs. Ormond, the case made brought the property, etc., used and acquired in the business, within the liability imposed by the statute, both in letter and in spirit.

That James B. Ormond was transacting business as a trader with the addition of the words "& Co.;" that he was in the active ostensible management of that business with the title of "Manager" (which is a word like "agent factor, etc.," and therefore embraced in the meaning of the word "otherwise" in the statute), that he had or seemed to have full and complete control of the business, his mother not being known to the public as having any interest in the business; that there was no sign about the premises where the business was carried on disclosing the name of the mother, that the business was in the name of the "Ormond Grocery Company;" that the insurance policy was payable to Ormond Grocery Company, is undisputed. So the case is brought within the very terms of the statute. The case is within the spirit of the statute by the testimony of Mrs. Ormond that she carries on the business in that name because of the judgment existing against her son and by the positive concealment of the true ownership, as evidence by her note to Meyer & Winner guaranteeing payment for goods ordered by the son, we think is clear.

If it be contended that the name "Ormond Grocery Company" did not mean the same thing as "Ormond & Company" or even "J. B. Ormond & Company" because the word "Ormond" thus used might as well be taken to refer to Mrs. Ormond as to B. F. Ormond, we answer, this not only violates the letter of the statute, but its spirit also. The statute does not say "with the addition to his name, but simply with the addition. And when we consider the fact of open ostensible charge of the business and its transaction by the son, the words "Or-

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Brief for appellees.

mond Grocery Company" would naturally be taken to mean the Ormond in charge of the business. There surely cannot be any difference, as regards the terms of the statute, between "Ormond & Company," which no one will dispute, would make the statute applicable, and "Ormond Grocery Company." To so decide would enable persons to evade the statute.

In *Evans* v. *Bright,* 66 Miss., 148, the firm was Henley & Carroll. Mrs. Carroll claimed and it was admitted that she was the real owner. The sign was Henley & Carroll. Cooper, J., delivering the opinion of the court, said: "True it is that the sign employed was that of Henley & Carroll and that the name Carroll might be applied either to the husband or the wife. But the statute applies the same to the ostensible owner, to him who transacts the business, unless a sign displayed the name of his principal," citing *Gumbel* v. *Koon,* 59 Miss., 264; *Wolf et al.* v. *Kahn,* 62 Miss., 814; *Hamblet* v. *Steen,* 65 Miss., 474.

In *Quin* v. *Myles,* 59 Miss., 375, where the business was conducted by Bazinsky, and the contract between Bazinsky and the real owners of the business was that the name was to be Henry Bazinsky & Company, the only sign being Empire Saloon, it was held that the property used or acquired was liable to the debts of Henry Bazinsky because he transacted the business.

The statute embraces money due the concern by an insurance company in a policy drawn in favor of the Ormond Grocery Company for a loss sustained in the burning of the stock of goods in the place of business of the Ormond Grocery Company. The policy was acquired in the business. The amount due on the policy was certainly a chose in action. 6 Am. & Eng. Enc. Law, 4, 5, and note.

R. F. Cochran, for appellees.

"Insurance is a contract whereby one, for a consideration undertakes to compensate another if he shall suffer loss." 1 May on Insurance (4th ed.), 2.

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Brief for appellees.

"It is also a personal contract and does not run with the title to the property. Whether the subject matter of insurance be a ship or a building or a life, or whatever else it may be, although in popular language it may be called an insurance upon the ship or building or life, or some other thing, yet it is strictly an agreement with some person interested in the preservation of the subject-matter, to pay him a sum which shall amount to an indemnity, or a certain sum agreed upon as an indemnity, in case his interest in the subject-matter shall suffer dimunition of value, from certain specific cause or in certain specified contingencies. It is a mere special agreement with a party seeking to secure himself against apprehended loss on account of his interest in a particular subject-matter, and not at all incidental to or transferable with the subject-matter. The contract of insurance does not run with the subject-matter of insurance, unless by special stipulations wholly foreign thereto. Satisfaction is to be made to the person insured for the loss he may have sustained; for it cannot properly be called insuring the thing, since there is no possibility of doing it, and therefore must mean insuring the person for damage." *Id.*, 8 and 9. The contract before loss is not assignable and is not subject to garnishment or attachment. If an execution creditor levies on property subject to the execution and property is burned before sale under execution, the money arising from the insurance contract is not liable to the debt, that is, there is no lien on the money. If property is fraudulently conveyed, for instance, without consideration, and a bill is filed by creditors to set aside the conveyance, and the property is destroyed by fire before final decree, the money due on the insurance contract is not liable to the debts of the creditors filing the bill, although such a lien is attached to the property by reason thereof. The same is true as to mortgaged property. If, after the mortgage is given, the mortgagor has the property insured, and it is destroyed by fire, the mortgagee has no lien or claim on the insurance money.

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Opinion of the court.

These well-established principles show that the insurance money does not represent or stand in lieu of the property insured, and that an insurance contract is a personal contract of indemnity, which does not, in fact and in law, insure the property, but insures the owner against the loss specified in the policy.

The insurance policy in this case was not a chose in action before loss within the meaning of the statute.

This question is clearly settled by the authority of the case of *Jackson* v. *Millpaugh,* 15 So. Rep., 576.

The policy of insurance in this case was neither acquired nor used in the business of the Ormond Grocery Company within the meaning of the statute. If it had been acquired in or used as a part of the assets of the Ormond Grocery Company, it would have been conveyed as such, but the case of *Jackson* v. *Millpaugh, supra,* clearly settles that it could not be so conveyed. It was not acquired in the business of the Ormond Grocery Company and was clearly outside of, separate and apart from said business.

TRULY, J., delivered the opinion of the court.

On December 17, 1901, a fire occurred in the city of Meridian, which, among much other property, destroyed the entire stock of goods of the Ormond Grocery Company, which at that time was covered by a fire insurance policy for $2,000 in the Queen Insurance Company. On December 20, 1901, appellant had issued an execution against James B. Ormond on a judgment in its favor obtained some three years before, and suggested the probable indebtedness to said James B. Ormond of the Queen Insurance Company, and prayed for garnishment. The insurance company first answered denying any indebtedness, but afterwards, on 15th October, 1902, filed another answer, and paid into court the sum of $500, the amount for which its policy of insurance on the stock of the Ormond Grocery Company had been compromised by agreement between its

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agents and Mrs. Eliza J. Ormond, and further stated that this money was claimed by Mrs. Eliza J. Ormond, and asked that she be cited to appear and contest the claim of the Meridian Land & Industrial Company to the same. On the same day Mrs. Eliza J. Ormond propounded her claim to said money or debt due by the garnishee on said policy of insurance, and averring that she was sole owner and proprietor of said property so insured, and that the money was hers. After some other pleadings, not necessary here to detail, issue was joined on the claim between the appellant and said Mrs. Ormond as to the liability of said money to the debt due by James B. Ormond to appellant. On the trial it developed that "Ormond Grocery Company" was the style under which the business concern was operated. Its sign and privilege license so read, and under this name its policy of fire insurance was written. There was no pretense that this was a corporation, the record plainly showing that the name was chosen purely as a convenient designation for the business. The letter heads of the concern contained the following: "Ormond Grocery Company, J. B. Ormond, Manager." James B. Ormond, according to the great weight of the testimony, was in sole charge of the business. He obtained the privilege license; bought goods to replenish stock, paid checks on the concern to the banks, paid his individual creditors by allowing them to trade in the store, paid at least a portion of the premium due on the fire insurance policy which was effected on the stock of goods, dealt with the other business men of the city, and, so far as the general public knew, was the sole proprietor and owner; and there was no sign about the store to the contrary, or to indicate who was the true owner. Mrs. Ormond, the claimant, testified that she was the owner of the business by purchase; that she was the mother of James B. Ormond; that she went to the store nearly every day, and personally investigated the accounts and business; that James B. Ormond was in immediate charge of said business, buying and selling goods,

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Opinion of the court.

and was her "agent managing said business," but further, that he was working for a fixed salary; that she would not give him an interest in the business, because she "knew of this unjust judgment hanging over him." The proof further shows that, when one of the local wholesale firms refused to sell Ormond Grocery Company on credit, the claimant signed a letter of guaranty to said wholesale firm, in which she stated that she would "see that any and all goods bought from said firm by Ormond Grocery Co., J. B. Ormond, Manager, are paid for." At the conclusion of the testimony in the case, each side asked a peremptory instruction, and the court gave that for the claimant, Mrs. Ormond; and the plaintiff in execution, the Meridian Land & Industrial Company, appealed to this court.

We cannot concur with the court below in the conclusion arrived at, as evidenced by the peremptory instruction given for appellee. It is manifest that the garnishment of the insurance company after loss incurred was perfectly proper. This very point was expressly decided by *Crescent Insurance Co.* v. *Moore,* 63 Miss., 419, and the case at bar is a plainer and stronger case than that. In the *Moore Case* the judgment was rendered against the garnishee before the loss under the insurance policy had been adjusted, and while the liability of the insurance company was still unfixed. In the case at bar the loss had not only been adjusted, but the money due by the insurance company actually paid into court to abide the result of the litigation between those claiming the fund.

The other and vital question here involved is whether the money paid into the court by the insurance company comes within the scope and meaning of section 4234, Ann. Code 1892 (section 1300, Code 1880). There can be no question, in the light of this record, that appellant's execution could lawfully have been levied upon the stock of goods in question prior to its destruction by fire, and a bald statement of the salient facts will show that it was liable for the debts of James B. Ormond.

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Opinion of the court.

Here was a man "transacting business as a trader," with the addition of the words "Grocery Company," with no sign "disclosing the name of his principal" anywhere about the house where the business was transacted. It would be difficult to frame a state of case more strictly within the intent and very letter of the statute. The fact that the word "Grocery" was added to the name "Ormond," together with the statutory word "Company," in no wise affects the legal principle. This was merely a characterization of the class of business conducted by "Ormond Company." The beneficent intent of a statute for the prevention of fraud cannot be defeated by such a transparent subterfuge.

With this in mind, we pass to the consideration of the other branch of the question: Can the money now in court in settlement of the loss of the stock be held? The language of section 4234, Code 1892, bearing upon the special point now under discussion is, "All the property, stock, money, choses in action, used or acquired in such business," shall be liable, etc. The word "acquire," as used in this statute, has no technical meaning. It means "obtain," "procure," "to get as one's own." Was not the money in controversy "obtained and procured" by and in this business? Did not James B. Ormond "get it as his own" through this business? A remedial statute must be liberally construed. Where its meaning and intent are plain, courts will not permit its force to be weakened—its scope limited—on account of possible verbal inaccuracies. In *Pollard* v. *Insurance Co.*, 63 Miss., 244, 56 Am. Rep., 805, speaking through Justice Campbell, this court held that an insurance policy covering a stock of goods was a contract in reference to the business—growing out of it, pertaining to it, concerning it. And the logical and luminous opinion in that case assists greatly in discerning the true legal principle controlling the question here involved. It is correctly stated by counsel for appellee that before loss an insurance policy against loss by fire is not a chose

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in action. This proposition is elementary, and needs neither argument nor citation of authority; the reason being that there has no right accrued to the assured under the policy, no liability been incurred by the assurer. But after loss—after the rights of parties have vested by the happening of the contingency insured against—how then? The money due or the right of action under the policy is the property of some one, and as such can be subjected to the owner's debts by proper legal process. Then to whom does the money or right of action belong? By operation of law, it belongs to the person deemed by the law to have been the owner of the property destroyed; and, the moment its ownership is fixed, it becomes liable, like all other property, to the debts of its owner. To illustrate: Suppose, under the second clause of section 4234, Code 1892, a person was transacting business in his own name with the means and for the benefit of an undisclosed principal, and his stock was destroyed by fire, would not the proceeds of the insurance policies on the stock be liable to his debts? Clearly so. There is no legal distinction between the case supposed and the case at bar. There is the same undisclosed principal; the same fixing by law of the ownership, "as to his creditors," in the ostensible owner; the same liability for his debts. In the case at bar, by operation of law, under section 4234, Code 1892, the ownership of the stock of goods in question was vested in James B. Ormond, not as against Mrs. Eliza J. Ormond, but "as to his creditors;" and the moment the property was destroyed the money due under the policy of insurance became "liable for his debts, and to be in all respects treated, in favor of his creditors, as his property." Otherwise this law intended to prevent fraud would be an encouragement to commit greater fraud and crime. For the dishonest debtor, knowing his insured stock of goods liable under section 4234, Code 1892, and fearing the levying of an execution, by applying the torch would have it in his power, if undetected, to defeat his creditor, collect the policy, and pocket the proceeds. This

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Statement of the case.

certainly is not the law. The peremptory instruction for appellee should have been refused, and that for appellant given.

Reversed and remanded.

MAURICE WINNER ET AL. *v.* JOHN BRANDON, ADMINISTRATOR.

1. CHANCERY COURT. *Oral testimony. Notice. Agreement. Code* 1892, § 1764.

In the absence of notice or agreement oral testimony is not admissible in the chancery court in a proceeding by an administrator to require the delivery of personal property to him, under Code 1892, § 1764, providing for the examination of witnesses in open court under certain conditions.

2. SAME. *Probate court jurisdiction.*

The Code section, Code 1892, § 1764, is restrictive and not enlarging, and requires a notice or agreement in writing in matters which were of probate court jurisdiction before the adoption of the Constitution of 1869.

HON. STONE DEVOURS, Chancellor.

John Brandon, administrator of the estate of William Brandon, deceased, appellee, was complainant or petitioner in the court below; Winner and others, appellants, doing business under the name of Winner & Meyer, were defendants there. From a decree adverse to them, defendants appealed to the supreme court.

William Brandon died November 30, 1899, and on the 14th day of that month letters of administration on his estate were granted to John Brandon. On the same day an appraisement was returned, in which it was stated that there were two bales of cotton in the hands of Winner & Meyer that belonged to the estate. This cotton was not turned over to the administrator by

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Brief for appellant.

Winner & Meyer, and he filed his application against them, requiring them to show cause why they should not turn over the cotton. Winner & Meyer answered this petition. At the May term, 1903, the cause came on for hearing, and several witnesses were introduced by the administrator, who testified orally. Winner & Meyer objected to the introduction of this oral testimony because no notice had been given them that complainant would examine his witnesses in open court, and no agreement in writing had been entered into between the complainant or petitioner and defendants that the witnesses might be introduced in open court. The court overruled the objection, and the witnesses were permitted to be examined in open court.

Ethridge & McBeath, for appellant.

The learned chancellor erred in admitting the oral testimony over objections of counsel for appellant. Sec. 1764, Code 1892, provides that: "In all proceedings in matters testamentary and of administration, in minor's business, and in cases of persons of unsound mind, and on the hearing of motions to confirm sales, and in similar cases, witnesses may be produced and examined in open court, or their depositions may be taken as in other cases in chancery court. In all cases where a party shall desire to have the witnesses examined in open court, he shall, before any depositions may be taken, file a notice to that effect, or the parties may agree in writing in any case to have all or a part of the witnesses examined in open court."

But in this case counsel filed no notice to the effect that he would take the testimony of his witnesses in open court, and there was no agreement in writing between the parties that the witnesses might be examined in open court. It occurs to us that section 1764 should not need the supreme court of our state to construe it, as it is very plain. But the court in the case of *Cox* v. *Kyle,* 75 Miss., 667, which was a case coming under section 1764, Code 1892, says:

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Opinion of the court.

"The want of any proof of the necessity or the propriety of the sale is apparent upon the face of the record. A recital in the decree of the taking of oral proof does not cure the defect. Such oral proof is admissible in matters of this kind only when notice is filed or the written agreement of the parties are made therefor under section 1764, Code 1892."

Certainly this decision is decisive of the point raised and the cause should be remanded, because the oral testimony was introduced.

Miller & Baskin, for appellee.

If appellant intended in good faith to rely upon the want of notice that oral testimony would be introduced, why did they not deny the administrator's petition, why did they not notify the administrator while they were getting the postponements that oral testimony was objectionable, why did they offer Mr. Winner, and when his testimony was excluded, why did they not stop and rest their case on the objection to oral testimony? Instead they offered oral testimony themselves, and if the chancellor had believed that it justified a finding in behalf of appellants we would never have had any errors. As the chancellor determined against appellants they bring the case here, thereby hoping to either force the administrator to settle with them or incur a cost bill, which will greatly decrease the little estate in his hands.

The application of the administrator under oath filed on November 21, 1902, gave appellant's written notice that the dispute was to be submitted orally, without any formality; the answer of the appellants did not deny this written notice.

CALHOON, J., delivered the opinion of the court.

We think there was error in admitting oral testimony without an agreement "in writing" that it might be offered, or a "notice to that effect" filed in the cause. We had occasion to

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Syllabus.

carefully examine Code 1892, sec. 1764, in *Dickerson* v. *Askew*, Ante, 436; s. c., 34 South., 157, in the light of the history of the law previous and subsequent to the Constitution of 1869, and held in that case that the section was restrictive, and not enlarging, so far as notice or agreement is concerned, and that notice or agreement in writing is now necessary even in matters which would have been of probate court jurisdiction under the law existing before that constitution. Objection to the oral evidence was promptly made when offered, and exception taken to its being overruled.

Reversed and remanded.

ALABAMA & VICKSBURG RAILWAY COMPANY *v.* AETNA INSURANCE COMPANY, AND

ALABAMA & VICKSBURG RAILWAY COMPANY *v.* DAVID J. SCHLENKER.

TWO CASES.

1. RAILROADS. *Fines. Storage of cotton near track. Contributory negligence.*

The storage of cotton bales in rows, tier above tier, with a passage way between the rows, ninety feet from a railroad track, tarpaulins being spread over the bales, but leaving part of the cotton near the ground unprotected, does not constitute such contributory negligence as will defeat the owner's recovery from the railroad company for the negligent burning of the cotton.

2. SAME. *Evidence. Escape of sparks. Other engines. Other times.*

In an action against a railroad company for the negligent burning of property, claimed to have been ignited by sparks escaping from defendant's locomotives, evidence of the emission of sparks from other of defendant's locomotives, within a reasonable time before and after the starting of the fire in question, is admissible.

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Statement of the case.

3. SAME.

Alabama, etc., Ry. Co. vs. Fried, 81 Miss., 314, a suit for damages resulting from the same fire as the one involved in these cases explained.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

The Aetna Insurance Company, appellee, in one of the cases, was plaintiff therein in the court below; Schlenker, appellee in the other case, was the plaintiff therein in said court. The railway company, appellant in both cases, was defendant in them both in that court. From a judgment in each case in favor of the plaintiff therein, the defendant appealed to the supreme court.

In January, 1903, some cotton belonging to the Mayer Cotton Company and also some belonging to appellee Schlenker, was destroyed by fire. The cotton which belonged to the Mayer Cotton Company was insured by the Aetna Insurance Company, and it paid the loss, and took an assignment of the owner's rights on account of the loss. The suits were brought by the respective plaintiffs to recover the value of the respective lots of cotton, each plaintiff alleging that the fire was caused by the negligent emission of sparks from defendant's locomotives. It was shown in evidence that the cotton was in the hands of a compress company, and was stored by it in a vacant lot on the east side of defendant's railroad tracks in Vicksburg, known as the "Hospital Lot," about 90 feet from the track; that the cotton was in rows, tier above tier, with a passage between the rows; that tarpaulins were spread over the cotton, which reached down nearly to the ground, but left part of the cotton near the ground unprotected by them; that the grade in the railroad track along by the lot is considerable; that just before the fire which destroyed the cotton, three of defendant's locomotives passed, going twelve or fifteen miles per hour; that there was a high wind blowing from west to east—towards the hos-

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Brief for appellant in both cases.

pital lot from the railroad track—and it was very dry. There was some evidence, introduced by plaintiff over objection of defendant, showing the emission of sparks just before and just after the fire by engines other than the ones claimed to have set out the fire. The court refused the following instructions asked for by defendant:

"Fourth, The court instructs the jury for defendant that, as the compress company placed this cotton in an open lot in close proximity to the railroad track, extra care of said cotton was demanded, and it devolved upon the compress company to show increased vigilance, and, if the said compress company failed to exercise said extra care or show said increased vigilance, and if the engines of defendant were properly equipped and managed, then the loss, if any, must fall upon the plaintiff, and the jury must find for the defendant."

"Sixth, The court instructs the jury for defendant, if the owner of property adjacent to a railroad has been careless or imprudent in the management of his property with reference to a possibility of a fire, the railroad company is not liable."

McWillie & Thompson, for appellant in both cases.

The court below recognized the well-settled rule that those who place inflammable material so close to a railroad track as to be in danger of emission of sparks assume the risk of loss by fire, but refused to give any instruction as to the duty of the party assuming such risks which did not include the idea of complete freedom of negligence on the part of the railway company, and refused to give defendant's third instruction which did include that idea. This was a queer view to take of the doctrine of contributory negligence which has no operation disconnected with negligence on the part of the defendant. The very idea of contributory negligence of the owner assumes some negligence on the part of the railroad company. *Collins* v. *Railroad Company,* 5 Hun., 499; s. c., 71 N. Y., 609; *Ross* v. *Rail-*

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road Company, 6 Allen (Mass.), 92; *Smith* v. *Railroad Company,* 37 Mo., 287; *Railroad Co.* v. *Bartlett,* 6 S. W. Rep., 549; *Allibone* v. *Railroad Co.,* 2 Tex. App. (67 Cas.), 52; *Railroad Co.* v. *Levi,* 59 Tex. App., 674; s. c., 13 Am. & Eng. Railroad Cases, 464; *Post* v. *Railroad Co.,* 108 Pa. St., 585; *Railroad Co.* v. *Shamfelt,* 47 Ill., 497; *Coates* v. *Railroad Co.,* 61 Mo., 35; *Ruse* v. *Railroad Co.,* 85 Ala., 497.

The court below also carried its erroneous idea of the law into the instructions for the plaintiff. While it is not negligence *per se* for one to store his baled cotton in a yard in close proximity to a railroad track, the question of whether or not the act in so doing is negligence is one for the jury under all the circumstances of the case. In a well considered case before us, the plaintiff asked and obtained the following instruction:

"You are instructed that the plaintiffs had a right to place their cotton upon their cotton yard, and in so doing they would not on this account alone be guilty of negligence, although said cotton yard was in close proximity to defendant's roadbed."

The judgment for plaintiff was reversed, the court after distinguishing the use of such a place for materials not inflammable as brick, etc., saying: "So in the use of a yard contiguous to a railway track for the purpose of storing baled cotton, which as a matter of common knowledge is inflammable and easily ignited, it necessarily results that the cotton will be subjected to some danger from fire, it might be doubtful if the storing of baled cotton in such a place was a prudent act and the question should be submitted to the jury." The court further mentions the "necessity of leaving the entire question of negligence to the jury, under all the evidence." *Texas, etc., R. Co.* v. *Levi,* 13 Am. & Eng. R. R. L. Cas., 464.

In the *Fried Case,* 81 Miss., 314, it was expressly decided by this court that while the placing of the cotton on the Hospital Lot was not negligence *per se,* the question of contributory negligence in placing it there was one to be submitted to the jury.

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Brief for appellee in both cases.

Little can be said of the prudence of any one who would put cotton on the lot in question if one-tenth of what plaintiff's witnesses say be true as to the exposure to sparks and frequency of fires. The instructions granted the plaintiff assume that there was an entire absence of negligence in the placing of the cotton on the lot in question by confining the consideration of the jury to the alleged negligence of the defendant.

The engines in the cases now before us are clearly identified as switch engine No. 419, which carried up the circus cars and the passenger engine operated by Lewis, engineer, the number of which could have readily been obtained if it was necessary to prove the identity of the same by number.

Witnesses for the plaintiff were allowed to testify over defendant's objection as to the emission of sparks and fires at other times and places without identifying the particular engine, and also to testify as to the emission of sparks by engines pulling up the steep incline leading down to the river, where the conditions were entirely dissimilar from those along Pearl street at the location of the hospital lot.

As the court will see the error of the court below was carried into the instructions given in favor of the plaintiff, the jury being allowed by plaintiff's fifth instruction to take into consideration the fact of the emission of sparks from any engine of the defendant at the date of the fire. On this subject we refer the court to the authorities cited in our brief in the *Fried Case*, as reported, 81 Miss., pp. 315-320.

McLaurin, Armistead & Brien and *Catchings & Catchings*, for appellee in both cases.

It will be observed that while the witnesses for appellee proved that three locomotives had passed the hospital lot shortly before the fire, they were not only unable to show which of the three locomotives set out the fire, but could not specifically identify the three locomotives themselves. They testified that

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one of them was a passenger and the other two switch engines, but they could not distinguish them from the other passenger and other switch engines in use by appellant. Under these circumstances, the courts are practically unanimous in holding that testimony as to the emission of sparks of undue size, or in excessive quantity, by locomotives generally, at or about the time of the fire, is competent as showing the habitual use by the defendant railroad of improper spark arresters.

In the case of *Richardson* v. *Grand Trunk Ry. Co.*, 91 U. S., 454, the evidence of plaintiff "tended to show that the fire was communicated from one of the locomotive engines belonging to plaintiff in error," which passed shortly before the fire, but the court nevertheless held that "the particular engines not being identified," evidence of the throwing of sparks by the locomotives of defendant generally was competent.

From the very nature of the case, it is rarely possible to find persons who actually saw a locomotive or locomotives which passed the property destroyed emitting sparks of extra size, or in undue and unnecessary quantity.

"When a fire is started by a locomotive which cannot be identified, the plaintiff may introduce evidence showing the habitual use by the company of improper spark arresters. *Gowan* v. *Glaser*, 10 Atl., 417.

"But the evidence is properly confined to such as tends to show the prevalence of the habit at or about the time of the fire complained of." *Davidson* v. *St. Paul R. R. Co.*, 34 Minn., 51.

"Evidence that at other times sparks from fire had been thrown from locomotives to a greater distance from the track than the buildings destroyed, such as were liable to set fire to objects, is admissible." *Sheldon* v. *Hudson R. Co.*, 14 N. Y., 218, and cases.

"Evidence of the emission of sparks by the defendant's engines, both prior and subsequent to the time of the fire sued for, is admissible." *Home Ins. Co.* v. *Penn. Ry. Co.*, 11 Hun. (N. Y.), 182.

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Brief for appellee in both cases.

"It is proper to prove that the company's engines had about the time of the fire in question, and at other places, some as much as twenty miles distant, emitted sparks, the proof being proper, both for the purpose of showing negligence, and for the purpose of showing that the fire in question originated from the company's negligence. *T. & P. R. Co.* v. *Land,* 3 Tex. App., 74; *Gulf, etc., R. Co.* v. *Holt,* 11 Am. & Eng. Cases, 72; see also 56 Am. & Eng. Cases, 91.

"It was competent to show the manner in which defendant's engines emitted fire shortly after the time of the fire in question.—*Pittsburgh R. Co.* v. *Noel,* 77 Ind., 110.

A very well considered case, *Inman* v. *Railroad Co.,* 90 Ga., 663, very clearly lays down the rule as to the admissibility of evidence of other fires:

"Where the engine that causes the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on the former occasion near the time of the fire in question, is generally held relevant and competent to show habitual negligence and to make it probable that plaintiff's injury proceeded from the same quarter; but when the engine is identified the same reason does not operate and evidence as to the condition of other engines and of their causing fires is clearly irrelevant."

In this case as in the *Fried Case,* counsel for the railway company sought to have submitted to the jury the question as to whether or not the compress company was guilty of contributory negligence in storing the cotton on the hospital lot in close proximity to its tracks, and in both cases the lower court refused the instructions which sought to submit this question to the jury, holding, under the authority of the case of *Home Ins. Co.* v. *Railway Co.,* 70 Miss., 119, that as a matter of law no contributory negligence had been shown. In that case it appeared that the property destroyed by fire was a saw mill situated about twenty-one feet from the railroad track, and that the ground around the mill was covered with a deposit of dust,

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Brief for appellee in both cases.

shavings and other inflammable matter. The owners of the mill instituted suit against the railroad company, claiming that the fire had been set out by one of its locomotives, and the defendant was granted an instruction submitting to the jury the question of the plaintiff's contributory negligence in maintaining his saw mill under these conditions. This court reversed the case on appeal, saying:

"The weight of authority, however, and the better reason, in our opinion, is that one who uses his land in a natural and ordinary way, for purposes to which it is suited, is not required to anticipate negligence by the adjacent railway company, and his failure to so manage his business as to protect his property from loss against such negligence is not contributory negligence on his part which will prevent a recovery against the company."

The court also quoted with approval the following language used in the case of *Salmon* v. *Railroad Co.*, 38 N. J. L., 5:

"A person is not called on to anticipate negligence on the part of another, and, by way of prevention, to make provision against its effects. The fire in question, upon the facts stated in these pleadings, was caused solely by the illegal act of the defendant, and there is no provision of law which required the plaintiff to foresee the doing of such an act, and to put his own land in a situation to withstand its effect. He owed no duty to the defendant in this respect, and consequently negligence, in its legal sense, cannot be imputed to him."

In the case at bar the testimony shows that the compress company did far more than merely to use the hospital lot in its natural and ordinary way. It did, in fact, take active precautions to prevent the cotton from being fired by appellant's locomotives. It kept watchmen on the ground night and day, whose duty it was to watch the cotton with particular reference to passing locomotives, and in addition to this, the rows of bales nearest the railroad track were covered with tarpaulins, while barrels of water to be used in extinguishing fires, were kept at

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Opinion of the court.

convenient intervals. If appellant negligently permitted fire to escape from its locomotives, it cannot complain that the precautions adopted by the compress company were insufficient to avoid losses from its negligence.

As we have said, this precise question was before this court in the *Fried Case*, and that case was affirmed. While it is true that the opinion inadvertently stated that this question was submitted to the jury, the court's attention was called to this error by suggestions of error filed by both parties to the appeal, and it nevertheless refused to disturb its affirmance of the judgment of the lower court. This refusal must have resulted from the conviction that the action of the lower court in refusing to submit the question of contributory negligence to the jury was correct.

Argued orally by *T. A. McWillie*, for appellant, and by *A. A. Armistead* and *O. W. Catchings*, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

These two cases are submitted together, as they depend upon the same state of facts. We do not think any of the objections made by appellant worthy of serious consideration except these two: First, that the compress company was guilty of contributory negligence in placing the cotton where it was; and, second, that it was error to have admitted testimony showing the emission of sparks just before and just after the fire in question, by other engines than the three which appellant claims must have set out the fire. In respect to the first proposition, counsel for appellant say in their brief: "We are not insisting that the act of so placing the cotton was negligence *per se*, nor, at present, that the question of whether or not the act of so placing it constituted negligence should have been submitted to the jury, but that the question of whether or not proper precautions were taken to guard against the recognized danger should have been submitted to the jury." But their citation of authorities and

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argument are almost wholly addressed to the purpose of showing that it was contributory negligence on the part of the compress company to store this cotton in its own lot in the usual and ordinary way, some ninety feet from the railroad track. So far as proper precautions are concerned, we think the testimony abundantly shows the taking of all proper precaution by the compress company. So far as the contention that it was contributory negligence on the part of the compress company as to where the cotton was placed is concerned, it is sufficient to say that this was disposed of by the case of *Home Ins. Co.* v. *Railway Co.*, 70 Miss., 134, 12 South., 159. The sharp conflict in authorities on this subject was recognized in that case, and this court, upon the fullest consideration, aligned itself with those which hold "that one who uses his land in a natural and ordinary way, for purposes for which it is suited, is not required to anticipate negligence by the adjacent railway company; and his failure so to manage his business as to protect his property from loss against such negligence is not contributory negligence on his part." As said by Chief Justice Beasley in the case of *Salmon* v. *Delaware Railroad Company*, 38 N. J. Law, 5, 20 Am. Rep., 356: "No support in any of these authorities can be found for the assumption that, if a landowner places his stacks of grain or hay on the confines of his land, that thereby, in a legal point of view, he becomes a contributor to a fire occasioned by negligence on the land of his neighbor. By such an act, it is true, he takes the risk of the consequences of an accidental fire on the contiguous premises, but not of a neglect which he can be called upon either to anticipate or to guard against." The principle is that where one is making that use of his property for which it was intended, and is so using it in the way in which it would usually and ordinarily be used for that purpose, he is strictly in the exercise of a legal right — merely asserting a legal dominion over his own; and that, per consequence, contributory negligence is not legally

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Opinion of the court.

predicable of that sort of use of his property. An act, to constitute contributory negligence, must be an act, as to place and time and circumstances, illegal in its nature; and it is a mere confusion of thought to characterize as contributory negligence the use of one's own property in a purely legal way. It is not that the doctrine of contributory negligence in the field of its proper operation is at all infringed; but that that doctrine has no field for operation in the condition of facts stated. It might have been sufficient to say that the case of *Railway Co.* v. *Fried,* 81 Miss., 314, 33 South., 74, distinctly reaffirms the doctrine of *Miss. Home Ins. Co.* v. *Railway, supra.* Justice Terral, speaking for the court, said: "It merely puts upon the owners the risks arising from the nonnegligent use of its railroad by the company operating on the track, and nothing more. The company itself is under a duty of not exposing the property upon the adjacent lots to the risk of fire arising from the negligent operation of its engines." And it is insisted lastly by counsel for appellant that the *Fried Case* decided in the next two sentences that the court should have submitted to the jury whether the very use of the compress company's own property in the usual and ordinary way for the purpose for which it was suited, which the court had just said could not present a case in which contributory negligence could be charged against the compress company, constituted or not contributory negligence. This would put the court in an inconsistent attitude. Manifestly, the court had just decided in the language which we have quoted that, if the compress company was merely using its lot for the storage of cotton in the usual and ordinary way — the way suited to its use as a cotton storage lot — then it was legally impossible that in such use it could be guilty of contributory negligence, within the proper understanding of what contributory negligence is. Of course, having decided just that thing, the court did not mean by the inadvertent expression in the opinion that the question of contributory negligence was left

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Opinion of the court.

by the learned judge to the jury, to reverse its previous declaration. It was not so left to the jury. What was meant — as shown by the last two clauses of the second paragraph of the opinion, taken in connection with the declaration just mentioned in the foregoing part of the second paragraph — was simply this: that the question whether the compress company was guilty of contributory negligence in the use of its lot by using it in a way not usual and not ordinary, a way not suitable for proper cotton storage thereon, should have been left to the jury. In other words, all that was meant to be said was that it was for the jury to say whether the compress company was devoting its lot to an improper use in putting cotton there — whether the storage of cotton on that lot was an improper use to put that lot to — one not usual or ordinary. It would be a question of fact whether the lot was suitable for cotton storage, and whether the storage of cotton thereon was a usual and ordinary use of the lot; and that might have presented for the jury a question of contributory negligence or not. But it was not meant (granting that the lot was suitable for cotton storage, and granting that such use of the lot was a usual and ordinary use) that any question of contributory negligence could arise to be submitted to the jury. It was simply one of those inadvertent expressions thrown off by the judge writing the opinion *currente calamo,* but not one which ought to have been misunderstood in view of the plain declaration of said paragraph 2 of said opinion affirming the doctrine of the *Miss. Home Ins. Co. Case.*

As to the second proposition. It is distinctly held by the supreme court of the United States in *Grand Trunk Railway Co.* v. *Richardson,* 91 U. S., 470, 23 L. Ed., at page 362, that it is competent to prove the emission of sparks capable of setting out fire before and after the fire was set out, and about that time, without identifying the particular engine which set out the fire in a particular case. That court on that subject says:

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Opinion of the court.

"The third assignment of error is that plaintiffs were allowed to prove, notwithstanding objections by the defendant, that at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiff's case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. *Piggot* v. *R. R. Co.*, 3 M. G. & S., 229; *Sheldon* v. *R. R. Co.*, 14 N. Y., 218, 67 Am. Dec., 155; *Field* v. *R. R. Co.*, 32 N. Y., 339; *Webb* v. *R. R. Co.*, 49 N. Y., 420, 10 Am. Rep., 389; *Cleveland* v. *R. R. Co.*, 42 Vt., 449; *R. R. Co.* v. *Williams*, 44 Ill., 176; *Smith* v. *R. R. Co.*, 10 R. I., 22; *Longabaugh* v. *R. R.*, 9 Nev., 271. There are, it is true, some cases that seem to have asserted the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any known cause, that they caused the fire; and it seems to

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us that under the circumstances this probability was strengthened by the fact that some engines of the same defendant at other times during the same season had scattered fire during their passage."

It will be observed that such testimony is held to be competent on the ground that, though it is not direct evidence, it nevertheless does tend to prove the possibility, and the consequent probability, that some locomotive caused the fire, and that it further tends to show a negligent habit of the officers and agents of the railroad company. It will be further observed that the United States supreme court in this case admits that there are authorities to the contrary, but states that the conclusion it reached was the one sustained by the weight of authority in this country and in England. In the valuable note to this case there is the most abundant citation of authorities on all related propositions, and on this particular proposition it is laid down as settled that such evidence is competent. See cited, amongst many other authorities, *Henry* v. *R. R. Co.*, 50 Cal., 176; *Smith* v. *R. R. Co.*, 10 R. I., 22; *Annapolis & E. R. R. Co.* v. *Gantt*, 39 Md., 115; *Cleveland* v. *G. T. R. R. Co.*, 42 Vt., 449. And, indeed, it is pointed out in this note that, in order to raise a case of negligence by destruction by fire of property adjacent to a railroad in New York it is required to show by additional proof "that defendant's engines had at other times before or after the burning set out other fires"; thus, of course, recognizing the competency of such proof. This general rule we understand to be settled in the *Tribette Case*, in 71 Miss., at pages 228-231, 13 South., 901. In that case the court held competent the testimony of Lewis Harvey for the plaintiff to the effect "that about three miles north of Terry he saw on a clear, sunshiny day, plenty of sparks flying from the engine, and firing grass beyond the railroad's right of way." This testimony was offered to show a setting out of fire three miles from the place where the fire occurred. As said by Justice

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Statement of the case.

Woods in that case: "It does not at all militate against this view that appellant is unable to say which of the two engines was the cause of the fire. It is not of vital importance to establish what engine did the work. The essential inquiry is, did an engine of appellee cause the conflagration?" We think the rule stated by the supreme court of the United States is the sound rule on this point. Besides, there was no identification in this case of any engine as being the one which set out the fire.

Affirmed.

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JOHN ANDERSON v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Rape. Passive resistance. Silent objection.*

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent, unless she be overcome by drugs, or other means.

2. SAME. *Evidence. Prosecutrix's declarations.*

Upon the trial of an indictment for rape, the state may show that the prosecutrix made complaint of her injury shortly after the assault upon her, but may not show the particulars stated by her, nor that she charged defendant with the wrong.

3. SAME. *Alibi.*

It is prejudicial error on a trial for rape to permit the declarations of the prosecutrix touching the particulars of, and charging defendant with, the wrong to be given in evidence, although the defense be an alibi.

FROM the circuit court of Yazoo county.

HON. ROBERT POWELL, Judge.

Anderson, appellant, was indicted, tried and convicted of rape, and appealed to the supreme court.

The facts, as stated by the prosecutrix, were in substance as follows: "I was going along about twelve o'clock. I was

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Brief for appellant.

afraid. I knew there was a man behind me, and the faster I walked the faster he walked, and he said, 'Old lady, I want some.' I said, 'I have not anything for you.' He took my stick out of my hand, and told me to cock my leg up, and put it in. He laid me down by the side of a bush, and said, 'Put it in.' He told me to lie down, and I did not lie down fast enough, and he laid me down himself. He got on me, put it in, and stayed a long time. I said, 'Lord have mercy,' and he said, If you don't hush, I will choke you to death.' "

The last clause of the second instruction for the state, mentioned in the opinion of the court, is as follows: "When a female submits to sexual intercourse through fear of personal violence, and to avoid the infliction of great personal injury upon herself, such carnal knowledge is rape." The opinion of the court contains a further statement of the facts.

Barnett & Perrin, for appellant.

It is well settled that appellate courts, and especially this court, in cases of alleged rape, do not hesitate to closely investigate the evidence, and unless fully satisfied of the truthfulness of the charge, will set aside the verdict.

We are not lacking for authority in making this statement, and call the court's attention to the following cases: *Monroe* v. *State,* 71 Miss., 196; *Green* v. *State,* 67 Miss., 356; *Hollis* v. *State,* 9 So. Rep., 67; *Harvey* v. *State,* 26 So. Rep., 931; *Tymes* v. *State,* 29 So. Rep., 91.

Taking as true everything to which the prosecutrix testified and admittting, for the sake of argument, that the defendant was present and had carnal knowledge of her, the evidence fails to show a case of rape.

Instruction No. 1 attempts to define rape, but winds up with the limitation as follows: "This is true whether you believe from the evidence that she made any active resistance to his assault upon her or not." We can conceive of cases, namely,

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where the defendant was drugged or where she was unconscious, or where she was imposed upon by fraud, where such a limitation, if the evidence warranted it, might be proper, but surely in the case at bar, where no such evidence was offered, the limitation was unwarranted, as a tacit consent without any act of resistance could not amount to rape.

The defendant was prejudiced by the conduct of the court in refusing to sustain the objections raised to the testimony of the witness, Sallie Dixon, in allowing her to state to the jury what her mother had said to her after the commission of the alleged offense. It is true the court finally sustained the objection, and attempted to qualify the nature of the hearsay evidence that was admissible, but the mischief had already been done, and the district attorney had based a number of questions upon the fact that the prosecutrix had told the witness that the defendant, using his name, had ravished her. 23 Am. & Eng. Enc. Law (2d ed.), 874.

J. N. Flowers, assistant attorney general, for appellee.

From the facts testified to by the witnesses, the jury could infer that there were violence, resistance, intimidation, force — all the elements of a crime.

The two instructions given for the state are not erroneous.

TRULY, J., delivered the opinion of the court.

Appellant was convicted of rape, and appeals. The first instruction for the state tells the jury that if they believe that the defendant forcibly and against the will of the prosecutrix carnally knew her, then he was guilty as charged, and the jury should so find; and "this is true whether you believe from the evidence that she made any active resistance to his assault upon her or not." This is tantamount to telling the jury that mere passive resistance, silent objection, on the part of the assaulted female, is sufficient to justify a jury in convicting of rape.

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Opinion of the court.

Under the facts developed, this was fatal error. It is true that, where the resistance of the female is overcome by drugs or similar means, this instruction might be correct; but no such case is developed here.

The second instruction for the state, while correct as an abstract proposition of law, was not applicable to the instant case. And the last clause of that instruction was dangerously misleading, in that the jury were authorized to conclude that it was intended by the court to convey the idea that the testimony warranted the belief that the assault in question had been submitted to by prosecutrix "through fear of personal violence, and to avoid the infliction of great personal injury," whereas the testimony of the prosecutrix does not sustain this view.

The defense placed before the jury was an alibi. Under these circumstances it was prejudicial to appellant's case to permit the witness, Sallie Dixon, to testify, over repeated objections of defendant, that the prosecutrix (her mother), immediately after the happening of the occurrence, told witness that it was John Anderson (the defendant) who had raped her. It is true that the court did not expressly rule on the objections of the defendant to this testimony, but nevertheless the witness was permitted to repeat the statement four different times, and the district attorney was permitted to base one or more questions upon it before the court sustained the objection and ruled out the statement. The judge should promptly have intervened in a case of this character, so easy to charge, so difficult to defend, and sustained the objection of counsel for defendant, and prevented statements so prejudicial, and so contrary to the rules of evidence, getting before the jury. But, even after the judge had sustained the objection to the witness' statement that the prosecutrix had told her who had committed the assault upon her, he afterwards permitted the witness to state when and where it was that the presecutrix claimed that the assault had occurred. This, too, was error. The opinion of the court

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in *Brown* v. *State,* 72 Miss., 997, 17 South., 278, is misunderstood, when it is referred to as an authority for the introduction of this testimony. That opinion, on the contrary, expressly limits the statement of the prosecutrix, after the perpetration of the offense, to the bare statement that she claimed that an assault had been committed, though, as part of the *res gestae,* the witness is permitted to relate the physical condition, and any marks of violence upon the person or clothes of the prosecutrix. Ordinarily any and all statements made by a party assaulted after the commission of the crime is hearsay, and not admissible. An exception is made in the case of rape alone, but even in that case no statements made by the prosecutrix are admissible except her complaint that she had been ravished. The details of the transaction, the name of the party accused, the place where it is said to have occurred, the time of the alleged offense, cannot be proven by a repetition of the words of the prosecutrix. The exception in cases of rape is made upon the idea that outraged virtue will proclaim her wrong, and therefore silence might be considered as raising a suspicion of consent. This exact point was decided in the case of *Ashford* v. *State,* 81 Miss., 414, 33 South, 174.

For the errors indicated, the case is reversed and remanded.

CHARLES B. ARMISTEAD ET AL. *v.* ISAAC J. BARBER ET AL.

1. CHANCERY. *Bill of review. Interest of litigants. Parties. Misjoinder. Non-joinder.*

A bill in equity seeking to review the proceedings and decrees in a partition suit should—

(*a*) Set forth the interest of all the parties;

(*b*) Join all the parties to the original suit or show the facts justifying their nonjoinder; and

(*c*) Show the facts justifying the joinder of persons not parties to the original suit, if any be joined.

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Brief for appellants.

SAME. *Infants. Amendments.*

Where some of the parties seeking relief by a bill of review are infants and were defendants to the original suit, and it be charged that they were not served with process therein, it will be error upon sustaining a demurrer to the bill to dismiss the same without granting leave to amend, although such leave was not asked.

FROM the chancery court of Newton county.

HON. THOMAS KEITH, Special Chancellor.

Armistead and others, appellants, were complainants in the court below; Barber and others, appellees, were defendants there. The proceeding was by a bill of review.

In 1889 Barber and others filed a bill in the chancery court of Newton county against one Armistead and his four infant children, praying the sale, for partition of the proceeds, of certain lands in the said county, owned by complainants and defendants in said suit as tenants in common. A decree was rendered ordering the land sold and the proceeds divided, and the sale was afterwards duly confirmed. In November, 1902, Charles B. Armistead, Ruth McPherson, and Jennie B. Armistead, appellants, three of the infants who were defendants in the original suit, and who are yet under twenty-one years of age, by their next friend, filed the bill of review in this case. The bill of review does not set out the interest of the parties. Some of the parties to the original suit were not joined as parties to the bill of review, and other persons, not parties to the original bill, are made parties; the bill alleging that they own the land. The bill of review charges that complainants, appellants, were never legally summoned to appear in court to defend the original suit. The defendants demurred to this bill of review. The demurrer was sustained, and the bill dismissed. From that decree, complainants appealed to the supreme court.

Ethridge & McBeath, for appellants.

It is said, 4 Enc. Pl. & Pr., sec. 4, "In order to ascertain if

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there be error in the decree sought to be reversed, the general practice in this county is to look back of the decree into the whole record of the pleadings and proceedings, including orders, masters' reports, etc."

Enochs v. *Harrelson,* 57 Miss., 465, seems to be the fullest of our decisions on the question of a bill of review. It holds that an infant may, by original bill, impeach a decree against him for errors apparent, or file a bill of review, citing the case of *Sledge* v. *Boone,* 57 Miss., 222. Judge Campbell, in that case, says: "Ordinarily in the consideration of a bill of review is a consideration of the original cause upon a specific error assigned by the bill of review, and unless there be some good reasons against it, the court hearing the bill of review proceeded at once and rendered the proper decree in the original cause." 2 Daniel Chy. Practice, 1584. The court in the same opinion says further: "If the justice of the cause requires that it should be reheard, that course should be pursued." The case of *Enochs* v. *Harrelston, supra,* is almost identical with the case at bar, and upon that case alone, the decree appealed from should be reversed and the cause remanded, for such decree as the chancellor should have rendered in the original suit. Certainly the learned chancellor erred in dismissing this bill.

Amis & Dunn, for appellees.

The bill of review does not show that complainants are in any way damaged or injured by the decree complained of. This is necessary. 3 Am. & Eng. Pl. & Pr., 593; *Laidley* v. *Kline,* 25 W. Va., 208; *Riggs* v. *Huffman,* 33 W. Va., 426; *Bank* v. *Wilson,* 35 Va., 36; *Railroad Co.* v. *Rainey,* 7 Cold. (Tenn.), 420; *George* v. *George,* 67 Ala., 192; *Hargrove* v. *Lewis,* 7 Ga., 1118; *Foemper* v. *Barton,* 18 Ohio, 418; *Burley* v. *Flint,* 105 U. S., 247; *Brown* v. *White,* 16 Fed. Rep., 900; *Harris* v. *Hanie,* 37 Ark., 354.

The bill should show that complainants have an interest in

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Brief for appellees.

the subject-matter of the suit. This it does not do. *Bank* v. *Wilson,* 35 Va., 36.

The complainants do not offer to return their share of the $1,000 for which the property was sold under the decree. This we conceive to be necesasry. "He who would have equity must first do equity," is a cardinal rule.

The bill of review fails to join several persons who were parties to the original suit, nor does it assign any reason or excuse for not doing so. This is necessary. *Knowland* v. *Sartorious.* 46 Miss., 45; *Vaughn* v. *Cutrer,* 49 Miss., 782; *Friley* v. *Hendricks,* 27 Miss., 412.

The bill of review does not show how the defendants, F. N. McMullan, M. O. Bingham, H. C. Majure and Frank Loper, Armistead, are connected with the suit. It merely alleges that they own the land, but does not show whether or not they claim under the decree in said cause. For aught the bill shows they may claim title wholly independent of the decrees sought to be reviewed. We think it is necessary to show that those defendants claim under or through or under some one or more of the original parties to the suit. 3 Am. & Eng. Enc. Pl. & Pr., 590; *Knowland* v. *Sartorious,* 46 Miss., 45; *Curry* v. *Peebles,* 83 Ala., 225.

J. R. Byrd and *J. D. Carr,* on same side.

The bill in this case charges that the decree in the original suit is "void." If it be true that the decree is void, the demurrer was properly sustained, because a void decree can have no effect. A court will not entertain a bill to set aside such a decree. *Friley* v. *Hendricks,* 5 C., 412; *Pendleton* v. *Prestridge,* 12 Smed. & M., 302.

The law is well settled that a bill of review will not lie unless all parties to the original suit are made parties to the bill of review. That ground of demurrer was well taken and was properly sustained. *Friley* v. *Hendricks,* 5 C., 412; *Know-*

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Opinion of the court.

land v. *Sartorious,* 46 Miss., 45; *Vaughan* v. *Cutrer,* 49 Miss., 782.

The bill does not show that the appellants have any interest now in the subject-matter of this suit; or that Mrs. Ruth McPherson ever had any interest in it. If they have no present interest in the property they cannot be heard to complain.

The bill nowhere alleges that the appellants have been in any way injured by the decree that they seek to vacate, and surely if they have not been injured, in some way, they have no standing in court. *Vaughan v. Cutrer,* 49 Miss., 782.

The law requires all bills of review to be brought within two years of the rendition of the decree, except as to infants and persons of unsound mind. See sec. 2751, Code 1892. This bill shows that the original decree was rendered in 1889, and this suit was brought in 1902, thirteen years after the rendition of the original decree.

The appellants sue by next friend, but it is not shown that they are infants or persons of unsound mind, and, therefore, the bill was properly dismissed.

Before the appellants can sustain their bill they must do equity by paying back, or offering to pay back, the one thousand dollars that the bill shows was the fruits of the first decree, or so much thereof as was their proportional share, and having failed to do this, their bill is defective and was properly dismissed.

CALHOON, J., delivered the opinion of the court.

There is an appeal from a decree sustaining a demurrer to a bill of review and dismissing the bill, and the court was right in sustaining the demurrer on some of the grounds. The bill does not, as it should do, set forth the interests of all the parties; it does not, as it should do, join as parties some who were parties to the proceedings sought to be reviewed, nor give any reason for their nonjoinder; and it does not, as it should do,

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Statement of the case.

show why persons who are not parties to the original proceedings are made defendants to it. We expressly decline now to decide the other questions raised on the demurrer. Inasmuch as the rights of minors are involved, who aver that no process was served on them, and since there may be merit in their claim, my associates hold that the court erred in dismissing the bill, notwithstanding no leave was asked to amend. I yield to their opinion, but do so doubtingly, even in the face of *Kimbrough* v. *Curtis,* 50 Miss., 122, and *Hiller* v. *Cotton,* 48 Miss., 593. See 6 Enc. Pl. & Pr., 428.

Reversed and remanded, with leave to complainants to amend their bill as they see fit; but the costs of the appeal are taxed on the appellants.

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EDWARD SMITH ET AL. *v.* STATE OF MISSISSIPPI.

CRIMINAL LAW. *Robbery. Indictment. Code* 1892, § 1284.

Under Code 1892, § 1284, defining robbery as the felonious taking of the personal property of another in his presence or from his person and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, an indictment seeking to charge a robbery by taking property from the person of another by putting him in fear, etc., is fatally defective if it omit to charge either that the person said to have been robbed was put in fear of some immediate danger to his person or that the property was taken from his person.

FROM the circuit court of Claiborne county.

HON. GEORGE ANDERSON, Judge.

Edward and Richard Smith, appellants, were indicted, tried and convicted of robbery, and appealed to the supreme court. The facts touching the contents of the indictment, upon which the case was alone decided, are stated in the opinion of the court.

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Brief for appellants.

J. McC. Martin, for appellants.

The indictment is based on section 1284 of the Annotated Code of Mississippi, which reads as follows, to wit: *"Robbery; definition, etc.; fear of immediate injury.*— Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery."

The analysis of the foregoing section shows fully what cases fall within its provisions. 1. There must be a taking of the personal property of another feloniously. 2. Such taking must be of the personal property, in the presence and against the will of the owner, or such taking must be from the person of the owner and against his will. 3. Such taking must be not only of the property of another, in his presence, or from his person and against his will, but it must be so done, *by violence to his person, or by putting such person in fear of some immediate injury to his person.*

The expression *"in his presence,"* may be made plain by an illustration. Suppose A to have laying by him, in full view, some species of personal property, susceptible of being taken possession of and moved away. If B, then, should take such property into his possession and move it away, against the will of A, the offense would fall under that part of the definition "in his presence," because the property not being *on his person,* but *in his presence,* is forcibly and feloniously taken. This, of course, distinguishes the offense from larceny, as larceny supposes stealth, instead of applied personal force.

The expression, "from his person and against his will," constitutes a different class of offenses from the one last considered, but of the same kind. If A has on his person, say in his pocket, money or other article; and B takes the same from A's pocket, using violence to his person, or by putting him *in fear of some immediate injury to his person,* then another division of the same offense arises.

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Opinion of the court.

At common law, robbery is defined as follows, to wit: "Robbery is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or putting him in fear." This definition differs from section 1284, above cited, materially in the interpolation of the words, "by violence to his person or by putting such person in fear of immediate injury to his person."

The indictment laid against appellants does not follow section 1284, nor does it in fact state the statutory crime.

J. N. Flowers, assistant attorney general, for appellee.

Argued orally by *J. McC. Martin,* for appellants.

WHITFIELD, C. J., delivered the opinion of the court.

The indictment is founded on section 1284 of the Code of 1892, which is as follows:

"Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery."

The indictment, in its charging part, is as follows: "Present that Edward Smith and Richard Smith feloniously in and upon the body of one Boone Irby an assault making, did then and there put him, the said Boone Irby, in bodily fear and danger with the intent the goods and chattels and personal property then and there on the person of the said Boone Irby then and there to feloniously steal, rob, seize, take, and carry away; and then and there five dollars, lawful money of the United States, of the value of five dollars, the personal property of the said Boone Irby, then and there being found, did unlawfully and feloniously seize, rob, steal, take, and carry away." The first instruction for the state follows the indictment literally. It is obvious, from a comparison of the statute with the indictment

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Opinion of the court.

and first charge for the state, that the offense described in the statute is not set out in either. Neither states that the persons said to be robbed were "put in fear of some immediate danger to their persons," or "that the personal property was taken from their persons." This is not a case of robbery by taking the personal property "in the presence" of the party alleged to have been robbed. The thing attempted to be charged is that the robbery was committed by taking the property from the person by putting the person in immediate fear of injury to his person. Yet both these essential averments are omitted from the indictment and said first instruction. This is a statutory offense, and the language of the statute should be strictly pursued.

Reversed and remanded.

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INDEX.

ABANDONMENT.

1. *Homestead. Temporary absence. Animus revertendi.*

A temporary removal from the homestead by husband and wife because of necessity, they retaining an intention to return to the premises, is not such an abandonment of the home as will render valid the deed of the husband thereto, in which the wife did not join, under Code 1892, § 1983, providing that a conveyance by the husband of the homestead shall not be valid unless signed by the wife, etc. *Collins* v. *Bounds*, 447.

2. *Taxation. Assessment. Unconstitutional act of legislature.*

An existing valid assessment of land is not affected by the passage of an unconstitutional and void act of the legislature purporting to provide for a new assessment, and cannot be said to have been abandoned. *Butts* v. *Ricks*, 533.

ABSENT WITNESS.

See WITNESSES, 1.

Fooshee v. *State*, 509.

ACCEPTANCE.

See ACCORD AND SATISFACTION.

Cooper v. *Yazoo, etc., R. R. Co.*, 634.

ACCORD AND SATISFACTION.

Tender in full settlement. Acceptance. Protest.

If a creditor accept from his debtor a sum of money tendered in full satisfaction of his debt, and which would not otherwise have been paid to him, there is an accord and satisfaction, and he cannot recover more, although at the time he accepted he protested that more was due, and threatened to sue for the balance. *Cooper* v. *Yazoo, etc., R. R. Co.*, 634.

ACCOUNTING.

Reference. Misconduct of master. Electric methods.

Where a master, appointed to state an account involving business transactions covering a period of more than six years, makes his report less than one day, and apparently within two hours after

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ACCOUNTING—*Continued.*

the reference, his proceeding is too hasty to be productive of wholesome results, and his report should not be accepted by the court in the absence of evidence that due care and deliberation were given the subject. *Diggs* v. *Ingersoll*, 493.

ADJOURNED TERM.

See CHANCERY COURTS, 2.

First National Bank v. *Block*, 197.

ADJOURNMENT.

See BOARD OF SUPERVISORS, 1.

Keenan v. *Harkins*, 709.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS, 1, 2, 3.

O'Brien v. *Wilson*, 93.

ADVERSE POSSESSION.

1. *Necessity of exclusive possession. Innocent purchaser.*

A railroad company, claiming under an option contract, never recorded, having for more than ten years used and enclosed only a strip fifty feet wide on either side of its track, the same being sufficient for all of its purposes, and allowed the landowner to use and enclose the balance of the land covered by the option, cannot claim said balance by adverse possession; nor can it as against innocent purchasers for value claim that the legal title to said balance was held in trust for it. *Louisville, etc., R. R. Co.* v. *Gulf, etc., Improvement Co.*, 180.

2. *Same. Possession of part of tract. Extended by construction. Limitation on doctrine.*

Actual adverse possession of a part of the land described in a conveyance under which the possessor claims title will extend a constructive actual possession only to so much of the land as is used in connection with the tract actually possessed and which is reasonable and proper for that purpose, according to the custom of the country. *Ib.*

3. *Tax title. Statute of limitations. Code* 1892, § 2735.

Where the purchaser of land at a tax sale went into the actual possession of the land after the expiration of the time allowed

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ADVERSE POSSESSION—*Continued.*

for redemption, and remained in such possession for three years, claiming under his tax deed, a suit to recover the land because of defects in the tax sale or any step leading to the sale is barred, under Code 1892, § 2735, so providing. *Butts* v. *Ricks*, 533.

4. *Possession of part extended to whole tract. Navigable stream.*

The fact that a body of land is divided by a navigable stream and the part actually occupied lies entirely on one side of the same will not of itself prevent the application of the doctrine that the actual occupation of a part of a tract by one, claiming under a deed, will be referred to all the lands conveyed by the deed. *Ib.*

See EASEMENT, 1, 2.

Lott v. *Payne*, 218.

AGENCY.

See BUSINESS SIGN.

Meridian, etc., Co. v. *Ormond*, 758.

See HUSBAND AND WIFE, 1.

Johnson v. *Jones*, 483.

AGRICULTURAL PRODUCTS.

See LANDLORD AND TENANT, 1, 2.

Ball v. *Sledge*, 749.

ALIBI.

See CRIMINAL LAW AND PROCEDURE, 35.
RAPE, 8.

Anderson v. *State*, 784.

ALIENS.

See JURY, 1.

Fulcher v. *State*, 630.

ALIMONY.

Personal judgment. Process. Code 1892, § 3421. *Publication only.*

Under Code 1892, § 3421, providing for publication of summons for non-resident defendants, a personal judgment for alimony cannot

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ALIMONY—*Continued.*

be rendered in favor of a wife against her non-resident husband upon proof of publication only. *Larson* v. *Larson*, 116.

AMBIGUITY.

1. *Taxation. Assessment. Parol evidence.*

An assessment of land in these words, "Huntington & Le Valley Add. Owner's name Goyer Company, All section 9 and 10, Township ———, Range 18," cannot be shown by parol to mean lots 9 and 10 of Block 18 of Huntington & Le Valley's addition to the city of Greenville. *Leavenworth* v. *Greenville, etc., Co.*, 578.

2. *Verdict.*

Where the terms of a verdict are ambiguous the court is authorized and under a duty to have the jury make their meaning plain. *Owens* v. *State*, 18.

3. *Same.*

In a murder case, the jury being authorized upon conviction to fix defendant's punishment at imprisonment for life in the penitentiary, a verdict in these words, "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court," is insufficient to support a judgment sentencing defendant to the penitentiary for life, each juror having stated upon the return of the verdict, in response to the court, that he did not mean that a death sentence should be imposed and most of them that the word "term" in the verdict meant less than life imprisonment. *Ib.*

AMENDMENTS.

See CHANCERY COURTS, 15.

Armistead v. *Barber*, 788.

AMNESTY ACT.

See FIRE INSURANCE, 6.

Ward v. *Pennsylvania Fire Insurance Co.*, 124.

APPEAL.

1. *Chancery. Receiver. Interlocutory decree. Code* 1892, § 34.

A defendant from whom property is taken and placed in the hands of a receiver by an interlocutory decree, notwithstanding his claim that it is exempt from liability to his creditors (Code 1892,

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APPEAL—*Continued.*

§1971), is entitled to an appeal from the decree, under Code 1892, § 34, providing for appeals from interlocutory orders whereby the possession of property is changed. *Levy* v. *Rossel*, 68.

2. *Justice's court. Dismissal in Circuit court. Findings of fact. Supreme court.*

The supreme court will not disturb the findings of a circuit judge on disputed questions of fact on the hearing of a motion to dismiss an appeal from a justice's court. *Winner* v. *Williams*, 669.

3. *Same. Bond. Approval of justice. Time.*

The fact that a justice of the peace fails to indorse his approval on an appeal bond within five days after the rendition of judgment will not affect the validity of the appeal if his approval subsequently indorsed thereon show that the bond was filed within the five days. *Ib.*

4. *Same. Tender of bond.*

When an appeal bond has been tendered to a justice of the peace, the names of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing, which he cannot afterwards invalidate. *Ib.*

5. *Same. Jurisdiction. Circuit court. Code* 1892, §§ 83, 84.

A circuit court has no jurisdiction of a suit begun before a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. Code 1892, §§ 83, 84. *Ball* v. *Sledge*, 747.

6. *Same. Supreme court.*

The supreme court has no jurisdiction of a case begun in the court of a justice of the peace, unless the circuit court had jurisdiction. *Ib.*

APPELLATE PRACTICE.

See SUPREME COURT PRACTICE.

Short v. *State*, 473.

Alabama, etc., R'y Co. v. *Pounder*, 568.

APPRAISERS.

See EXECUTORS AND ADMINISTRATORS, 1.

O'Brien v. *Wilson*, 93.

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APPROVAL OF APPEAL BONDS.

See APPEAL, 3.

Winner v. *Williams*, 669.

ARRAIGNMENT.

See CRIMINAL LAW AND PROCEDURE, 39.

Short v. *State*, 473.

ARREST OF JUDGMENT.

See CRIMINAL LAW AND PROCEDURE, 39.

Short v. *State*, 473.

ASSAULT AND BATTERY.

1. *Civil action. Two assailants. Separate liability.*

In the absence of evidence of a conspiracy between plaintiff's assailants, their acts not being joint, a plaintiff cannot recover in a civil suit for an assault and battery against one of them because of injuries inflicted by the other. *Stone* v. *Heggie*, 410.

2. *Same. Conflicting instructions.*

A plaintiff's instruction authorizing such a recovery is not cured by one, given at defendant's request, informing the jury that defendant is not liable for the acts of the other assailant. *Ib.*

3. *Same. Weapons. Not deadly per se. Manner of use.*

The manner in which a weapon, not deadly *per se*, was used determines its character, and a charge to the jury, in a civil action for assault and battery, disregarding the manner of its use, its character being material, is erroneous. *Ib.*

4. *Same. Insults. Use of stick.*

While insulting words will not excuse or justify an assault and battery with a deadly weapon, yet a party insulted may use a stick, if he does not use it in the manner of a deadly weapon. *Ib.*

ASSAULT WITH INTENT TO MURDER.

1. *Criminal law. Intent to wound. Intent to kill.*

An intent to wound is not an intent to murder, nor is an intent to kill necessarily an intent to murder. *Thomas* v. *State*, 667.

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ASSAULT WITH INTENT TO MURDER—*Continued.*

2. *Criminal law. Instruction.*

An instruction for the state in a prosecution for an assault with intent to kill and murder is fatally erroneous, if it assume an intent to wound, or an intent to kill to be the same as an intent to murder. *Thomas* v. *State*, 667.

ASSESSMENT ROLLS.

1. *Ambiguity. Parol evidence.*

An assessment of land in these words, "Huntington & Le Valley Add. Owner's name Goyer Company, All section 9 and 10, Township ———, Range 18," cannot be shown by parol to mean lots 9 and 10 of Block 18 of Huntington & Le Valley's addition to the city of Greenville. *Leavenworth* v. *Greenville, etc., Co.*, 578.

2. *Time for filing extended. Auditor of public accounts. Code* 1892, § 3784.

The auditor of public accounts has no power to extend the time for filing an assessment roll; this can be done only by the board of supervisors, under Code 1892, § 3784, empowering the board in the premises. *Bennett* v. *Maxwell*, 70.

ATTACHMENT FOR WITNESS.

See WITNESSES, 1.

Fooshee v. *State*, 509.

ATTESTING WITNESS.

See WILLS, 1.
WITNESSES, 2.

King v. *Rowan*, 1.

ATTORNEY'S FEES.

Deed of trust. Sale under. Trustee's compensation.

If a deed of trust be enforced by the trustee making sale of the property, he is entitled to retain from the proceeds for his services only a reasonable compensation to himself as trustee, although the note evidencing the debt secured by the deed stipulates for the payment of an attorney's fee in case it be collected by an attorney and the trustee is an attorney and a member of a firm of attorneys to whom the payee intrusted the note for collection. *Elkin* v. *Rives*, 744.

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AUDITOR OF PUBLIC ACCOUNTS.

The auditor of public accounts is not authorized to extend the time for the return of assessment rolls. *Bennett* v. *Maxwell*, 70.

BIGAMY.

Criminal law. Indictment. Defense. Marriage, prior to first one charged.

If the first marriage charged in an indictment for bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. *Lane* v. *State*, 555.

BILL OF REVIEW.

See CHANCERY COURTS, 15, REVIEW, BILL OF.

Armistead v. *Barber*, 788.

BOARD OF SUPERVISORS.

1. *Adjournment. Judicial action. Power to vacate.*

The board of supervisors, after final adjournment, is without power, ordinarily, to reverse or vacate its judicial acts. *Keenan* v. *Harkins*, 709.

2. *Same. Code* 1892, § 2059. *Stock law district. Adding territory.*

Where territory has been added to a stock law district by order of the board of supervisors the board cannot at a subsequent meeting vacate the order, except as authorized by statute, Code 1892, § 2059. *Ib.*

3. *Assessment. Unconstitutional act of legislature. Abandonment.*

An existing valid assessment of land is not affected by the passage of an unconstitutional and void act of the legislature purporting to provide for a new assessment, and it cannot be said to have been abandoned by the board of supervisors. *Butts* v. *Ricks*, 533.

4. *Salary. Local act. Laws* 1890, *p.* 386. *Repeal by general act. Code* 1892, § 8.

Laws 1890, p. 386, ch. 250, sec. 8, authorizing a salary to members of the board of supervisors of Madison county, was not repealed by Code 1892, which reproduces the general, but not the local, provisions of such act, as § 8 of the code preserves all private and local laws unless repeal or modification be "expressly so provided." *Adams* v. *Dendy*, 135.

5. *Same. Constitution of* 1890.

Constitution 1890, being prospective, does not affect such act, it being in force at the time of the adoption of the constitution. *Ib.*

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BOARD OF SUPERVISORS—*Continued.*

6. *Stock law district. Laws* 1900, *p.* 164, *ch.* 124. *Enlarging districts.*

Under laws 1900, ch. 124 (Laws, p. 164), empowering them so to do, the board of supervisors may create a stock law district less in area than a township, if the territory thereof be adjoining and contiguous to a pre-existing district in the same or an adjoining county. *Shaw* v. *Woffard*, 143.

BONDS, MUNICIPAL.

See MUNICIPALITIES, 4,

Yazoo City v. *Lightcap*, 148.

BRIDGES.

1. *Navigable waters. Insterstate stream. Grant by state.*

A state may authorize the building of a bridge, wholly within its territory, over a navigable interstate stream, in the absence of congressional action touching the subject. *Kansas City, etc., R. R. Co.* v. *Wiygul*, 223.

2. *Same. Railroads. Power to bridge. Repairs.*

Power granted to a railroad company to build a bridge across a navigable stream includes the power to repair the same. *Ib.*

3. *Same. Acts of congress. U. S. Comp. Statutes*, 1901. *p.* 3540.

The act of congress, approved March 3, 1899, sec. 10 (30 Statutes at Large, 1151), prohibiting the creation of any obstruction, not authorized by congress, to the navigable capacity of any waters of the United States, is prospective and was not intended to take away from a railroad company the power to repair a bridge, built by it over an interstate stream under a grant from the state. *Ib.*

BUILDING AND LOAN ASSOCIATIONS.

1. *Contract stipulation. Final settlement. Rate of interest.*

Where a borrowing member of a building and loan association pledged his stock in the association and mortgaged other property as security for the loan, and the contract stipulated that "On the maturity of the stock so advanced upon, total payments of installments, interest, and premiums shall not exceed the amount of the advance, with interest thereon at the highest contractural rate per annum allowed by the statutes of the state," the borrower is entitled to the benefit of the stipulation only on maturity of the stock. *Georgia State, etc., Association*, v. *Grant*, 424.

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BUILDING AND LOAN ASSOCIATIONS—*Continued.*

2. *Contract stipulation. Final settlement. Rate of interest.*

A provision in the by-law of a building association that, "where its loan contracts are governed by laws that limit the aggregate amount of premium and interest that can be taken on them, only so much of the premium collected shall be taken as profits by it as will, with the interest collected, equal and conform to the highest contractural rate of interest in such state, the balance of the premium being used at settlement" in reduction of the debt, gives the borrower the benefit thereof only on final settlement, after maturity of the stock. *Georgia State, etc., Association* v. *Grant*, 424.

3. *Same. Stockholders' payments. Withdrawal fees.*

A complainant who seeks by suit to have the contract by which he, as a stockholder, borrowed money of a building and loan association declared usurious, is not entitled to have credited on the principal of his loan the sums paid by him in his character of stockholder on expense account or for fines and withdrawal fees. *Ib.*

4. *Usury. Contract to waive. Public policy.*

A contract by a borrower to waive, directly or indirectly, the usury laws is against public policy and void. *Ib.*

BURDEN OF PROOF.

1. *Devisavit vel non. Insanity.*

Where on an issue *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *King* v. *Rowan*, 1.

2. *Same. Contest. Probation prima facie.*

The burden of proof is on the proponents of a will on an issue *devisavit vel non* both as to testamentary capacity and undue influence, but they make out their case *prima facie* by showing the due probation of the will. *Sheehan* v. *Kearney*, 688.

BUSINESS SIGN.

Code 1890, § 4234. *Undisclosed principal. Absence of sign. Insurance policy. Garnishment.*

Code 1892, § 4234, provides that, if a person shall transact business, as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to

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BUSINESS SIGN—*Continued.*

disclose the name of his principal or partner by a sign in letters easy to be read placed conspicuously at the place of business, or if any person shall transact business in his own name without any such addition, all the property used or acquired in such business shall be liable for the debts of the person so transacting the business; and under this statute:

(*a*) Where a mercantile business was conducted under the name "Ormond Grocery Company," without a sign disclosing the real owner, the property used and acquired therein is subject to the debts of the party transacting the business, although in so doing he was in truth the agent of an undisclosed principal; and,

(*b*) The proceeds of a policy of fire insurance on goods acquired and used in such business and burned while in such use is liable to the creditors of the party who transacted such business, and may be garnished by them. *Meridian, etc., Co.*, v. *Ormond*, 758.

CARRIERS, COMMON.

1. *Delay in shipment. Pleading. Negligence.*

A declaration against a common carrier charging an unreasonable and negligent delay in the shipment of freight, describing the freight and the points from and to which and the persons by and to whom the shipment was made, is not demurrable for a failure to state the facts of which the charge of negligence is predicated. *Alabama, etc., Ry. Co.*, v. *Pounder*, 568.

2. *Same. Notice of arrival.*

If a carrier, being under duty by universal and well understood custom to notify the consignee of the arrival of freight at the point to which it has been shipped, negligently delay giving such notice, it will be liable as for a delay in the shipment. *Ib.*

3. *Same. Consignee's representatives. Demand. Wrong car.*

A carrier, under duty by custom to give notice of the arrival of freight, having knowledge that the consignee has a local agent and business representative at the point to which the goods had been shipped and received and who had repeatedly called therefor, is negligent if it fail to notify such representative of the arrival of the goods, although the agent called for the freight by the wrong car number, if the freight to the knowledge of the carrier had been transferred en route to a car of another number. *Ib.*

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CARRIERS, COMMON—*Continued.*

4. *Delay in shipment. Variance. Appellate practice.*

In an action against a carrier by a consignee for the difference between what the plaintiff would have sold the goods for upon prompt delivery and what he was compelled to sell them for after delayed delivery, a variance between the declaration and the proof as to the name of the purchaser of the goods cannot be availed of for the first time in the supreme court. *Alabama, etc., R. R. Co.* v. *Pounder*, 568.

5. *Demurrage. Carriers of freight. Rules.*

A railroad can make and enforce rules imposing reasonable demurrage charges on consignees for delay in unloading cars. *New Orleans, etc., R. R. Co.* v. *George*, 710.

6. *Same. Lien for demurrage. Code* 1892, § 2108.

Code 1892, § 2108, giving a carrier a lien for freight and storage, with power to sell therefor, applies to demurrage for delay in unloading cars. *Ib.*

7. *Same. Notice.*

Formal notice is unnecessary to make a consignee liable for demurrage charges, if he knows of the arrival of the cars for him. *Ib.*

8. *Same. Private sidings. Delivery, when full. Partnership sidings.*

Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding be full, the road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding. *Ib.*

9. *Same. Demurrage on certain freight. Not on all.*

A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds. *Ib.*

10. *Same. Several cars. Demurrage enforced on one for all.*

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against its contents separately, but enough may be retained to satisfy the charge against all. *Ib.*

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CARRIERS, COMMON—*Continued.*

11. *Freight. Mistaken delivery. Suit.*

Where a carrier by mistake delivered freight to a person not entitled to receive the same, it may sue such person in trover for the property, or waive the tort and sue for the value of the goods, without an assignment to it from the owner. *Johnson* v. *Gulf, etc., R. R. Co.*, 452.

12. *Same. Partnership. Assignment by one partner.*

Where property belonging to a partnership is mistakenly delivered by a carrier to a stranger, and the carrier pays the partnership therefor, receiving an assignment from only one of the partners of his interest therein, it may sue the stranger for the value of the goods, notwithstanding the failure of the other partners to join in the assignment. *Ib.*

CHANCELLORS.

1. *Constitutional law. Constitution* 1890, *sec.* 158. *Interchange. Code* 1892, § 458.

Code of 1892, § 458, authorizing chancellors to alternate and make temporary exchanges of their districts, is constitutional, although by Constitution of 1890, sec. 158, the legislature is expressly authorized to provide by law for the interchange of circuit judges and there is no like constitutional provision respecting chancellors. *First National Bank* v. *Bloch*, 197.

2. *Chancery Courts. Adjourned terms. Code* 1892, § 913.

Where the chancellor, as authorized by Code 1892, § 913, directed the clerk to adjourn the regular term of the court to a designated day, and he did so, a decree, in a suit pending on the first day of the regular term, rendered on the day to which the term was adjourned was not rendered at a special term of the court, but at an adjourned term. *Ib.*

CHANCERY COURTS.

1. *Alimony. Personal judgment. Process. Code* 1892, § 3421. *Publication only.*

Under Code 1892, § 3421, providing for publication of summons for non-resident defendants, a personal judgment for alimony cannot be rendered in favor of a wife against her non-resident husband upon proof of publication only. *Larson* v. *Larson*, 116.

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Chancery courts.

CHANCERY COURTS—*Continued.*

2. *Constitutional law. Constitution* 1890, *sec.* 158. *Chancellors. Interchange. Code* 1892, § 458.

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4. *Election. Foundation of doctrine.*

The doctrine of equitable election is based on the principle that he who seeks equity must do equity. *Barrier* v. *Kelly*, 233.

5. *Same. Estoppel. Facts constituting.*

Where a mother, supposing in good faith that she owned an undivided one-half interest in lands, which in fact belonged to her elder son, conveyed the same to a trustee for her younger son when he became of age, and at the same time and as a part of the same transaction the mother conveyed other property to the same trustee for the elder son when he became of age, and the elder son upon reaching majority claimed and received of the trustee all the property conveyed in the deed made for his benefit and enjoyed the same, without objection, for four years thereafter, he is estopped from assailing the title of the younger son to the half interest in the lands. *Ib.*

6. *Same.*

In such case had the property conveyed to the use of the elder son exceeded the value of his lands conveyed by the mother to the use of the younger son the elder son might by timely proceedings have canceled the younger son's title and regained his lands upon surrender of so much only of the property conveyed to his use as equaled the value of his lands. *Ib.*

7. *Same. Pleadings. Construed strongest against pleader.*

In such case, since pleadings are construed most strongly against the pleader, a bill by the elder son to cancel the deed, made by

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CHANCERY COURTS—*Continued.*

the mother to the use of the younger son, which does not show the value of the property received by complainant under the deed made to his use, is demurrable. *Barrier* v. *Kelly*, 233.

8. *Evidence. Oral testimony. Notice. Agreement. Code* 1892, § 1764.

In the absence of notice or agreement oral testimony is not admissible in the chancery court in a proceeding by an administrator to require the delivery of personal property to him, under Code 1892, § 1764, providing for the examination of witnesses in open court under certain conditions. *Winner* v. *Brandon*, 767.

See DICKERSON *v.* ASKEW, 436.

9. *Same. Probate court jurisdiction.*

The code section, Code 1892, § 1764, is restrictive and not enlarging, and requires a notice or agreement in writing in matters which were of probate court jurisdiction before the adoption of the Constitution of 1869. *Ib.*

10. *Husband and wife. Homestead. Conveyance. Code* 1892, § 1983. *Insanity.*

A wife cannot maintain a suit to vacate a deed conveying his homestead, in which she did not join, made by her husband after he had abandoned her and the homestead, because of the insanity of the husband at the time of the execution of the deed. *Larson* v. *Larson*, 116.

11. *Same. Ejectment. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her when he executed the deed to the plaintiff. *Ib.*

12. *Receiver. Interlocutory decree. Appeal. Code* 1892, § 34.

A defendant from whom property is taken and placed in the hands of a receiver by an interlocutory decree, notwithstanding his claim that it is exempt from liability to his creditors (Code 1892, § 1971),) is entitled to an appeal from the decree, under Code 1892, § 34, providing for appeals from interlocutory orders whereby the possession of property is changed. *Levy* v. *Rossel*, 68.

13. *Same. Order appointing. Construction. Exemption.*

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. *Levy* v. *Rossel*, 527.

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CHANCERY COURTS—*Continued.*

14. *Receiver. Contract devoting property to creditors. Exemption.*

A contract by mercantile partners, who are largely indebted, that their business shall be conducted by others, and that all money arising therefrom shall be applied pro rata to the debts of the partnership, with power in the succeeding managers to replenish the stock, but requiring that the proceeds of all sales shall be deposited in a bank and paid out ratably to the creditors, will preclude the partners from claiming an exemption in the property covered by the contract. *Levy* v. *Rossel*, 527.

15. *Review, Bill of. Interest of litigants. Parties. Misjoinder. Nonjoinder.*

A bill in equity seeking to review the proceedings and decrees in a partition suit should—

(*a*) Set forth the interest of all the parties;

(*b*) Join all the parties to the original suit or show the facts justifying their nonjoinder; and

(*c*) Show the facts justifying the joinder of persons not parties to the original suit, if any be joined. *Armistead* v. *Barber*, 788.

16. *Same. Infants. Amendments.*

Where some of the parties seeking relief by a bill of review are infants and were defendants to the original suit, and it be charged that they were not served with process therein, it will be error upon sustaining a demurrer to the bill to dismiss the same without granting leave to amend, although such leave was not asked.

CHANCERY PRACTICE.

1. *Evidence. Oral testimony. Code* 1892, § 1765. *Equity cause.*

Under Code 1892, § 1764, providing that "in all proceedings in matters testamentary and of administration, in minors' business and in cases of persons of unsound mind, and on the hearing of motions to confirm sales and in similar cases," witnesses may be examined orally in the chancery court, but further providing that "this shall not change the rule as to . . . cases in which depositions generally are authorized," the two clauses must be construed together, and so construing the section the taking of oral proof on notice in an equity case to enforce a vendor's lien is not authorized. *Dickerson* v. *Askew*, 436.

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CHANCERY PRACTICE—*Continued.*

2. *Evidence, Notice. Agreement. Code* 1892, § 1764.

In the absence of notice or agreement oral testimony is not admissible in the chancery court in a proceeding by an administrator to require the delivery of personal property to him, under Code 1892, § 1764, providing for the examination of witnesses in open court under certain conditions. *Winner* v. *Brandon*, 767.

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The code section, Code 1892, § 1764, is restrictive and not enlarging, and requires a notice or agreement in writing in matters which were of probate court jurisdiction before the adoption of the Constitution of 1869. *Ib.*

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CHANGE OF VENUE.

Criminal law. Code 1892, § 1411. *Two offenses.*

Where a defendant is indicted in the same county for two offenses and is entitled to a change of venue for the trial of one of them, under Code 1892, § 1411, regulating the subject, he should on his application be granted a change of venue for the trial of the other, if the connection between the offenses be such that the pre-judgment, grudge or ill-will which entitled him to the change granted, operate adversely to him in the other case, although the commission of the crime therein charged did not produce such pre-judgment, grudge or ill-will. *Owens* v. *State*, 31.

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CIRCUIT COURTS.

1. *Jurisdiction. Circuit court. Foreign judgment. Costs. Amount.*

If the amount of the judgment of a justice of the peace in another state and the costs of suit therein paid by the plaintiff added exceed two hundred dollars the circuit court has jurisdiction of a suit for the aggregate amount brought in this state. *McDugle* v. *Filmer*, 200.

2. *Same. Justice's court. Dismissal. Findings of fact. Supreme court.*

The supreme court will not disturb the findings of a circuit judge on disputed questions of fact on the hearing of a motion to dismiss an appeal from a justice's court. *Winner* v. *Williams*, 669.

3. *Same. Code* 1892, §§ 83, 84.

A circuit court has no jurisdiction of a suit begun before a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. Code 1892, §§ 83, 84. *Ball* v. *Sledge*, 747.

CODE 1880.

§ 2422. Garnishment. Writ. Return. *Work* v. *Waggoner*, 591.

CODE 1892.

1. § 8. Repeal. Private acts. *Adams* v. *Dendy*, 135.
2. § 34. Interlocutory decrees. Receivers. Appeals. *Levy* v. *Rossel*, 68.
3. §§ 83, 84. Appeal. Justice of the peace. Jurisdiction. Circuit court. *Ball* v. *Sledge*, 747.
4. § 458. Section constitutional. *First National Bank* v. *Bloch*, 197.
5. §§ 493, 497. Infancy. Removal of disability. Trust estates, *Ray* v. *Kelly*, 597.
6. § 649. Suing for more than due. Penalty. Replevin. *Ball* v. *Sledge*, 749.
7. § 732. Instructions. When. Retirement of jury. *Clarke* v. *Pearce*, 462.
8. § 913. Adjourned term. Chancery court. *First National Bank* v. *Bloch*, 197.
9. § 950. Criminal law. Accessory before the fact. *Owens* v. *State*, 18.
10. §§ 1026, 1027. Carrying concealed weapons. Threats. *Murden* v. *State*, 507.

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Code, 1892.

CODE, 1892—*Continued.*

11. §§ 1120, 1121. Dealing in futures. *Blau* v. *State*, 514.
12. § 1255. Criminal law. Mingling poison. *Corpus delicti*. *Stanley* v. *State*, 498.
13. § 1284. Robbery. Indictments. *Smith* v. *State*, 793.
14. § 1298. Seduction. Chastity of woman. *Fooshee* v. *State*, 509.
15. § 1411. Criminal procedure. Change of venue. *Owens* v. *State*, 31.
16. § 1463. Criminal law. Conservator of the peace. Transcript of testimony. *Gamblin* v. *State*, 73.
17. § 1508. Minor. Who is. *Ray* v. *Kelly*, 597.
18. § 1520. Signature. Will. Written. *Sheehan* v. *Kearney*, 688.
19. § 1590. Intoxicants. Selling. Penalty. Husband and wife. *Thurman* v. *Adams*, 204.
20. § 1594. Criminal law. Procuring intoxicants for inebriate. *Jenkins* v. *State*, 500.
21. § 1747. Depositions. Physician. "Other cause." *American Express Co.* v. *Bradford*, 130.
22. § 1764. Oral testimony in chancery court. *Dickerson* v. *Askew*, 436; *Winner* v. *Brandon*, 767.
23. § 1983. Homesteads. Abandonment. *Collins* v. *Bounds*, 447.
24. § 2059. Stock law district. Change. *Keenan* v. *Harkins*, 709.
25. § 2108. Lien for demurrage. *New Orleans, etc., R. R. Co.* v. *George*, 710.
26. § 2293. Husband and wife. Agency of husband. Family supplies. Authority extended. *Johnson* v. *Jones*, 483.
27. § 2294. Husband and wife. Contracts. Third persons. *Williams* v. *Yazoo, etc., R. R. Co.*, 659.
28. § 2355. Jurors. Competency. *Fugate* v. *State*, 189.
29. § 2735. Tax titles. Statute of limitation. *Butts* v. *Ricks*, 533.
30. § 2755. Statute of limitations. Competition of bar. Municipalities. *Trowbridge* v. *Schmidt*, 475.
31. § 2756. Statute of limitations. Defective first suit. Time extended. Contract time. *Ward* v. *Pennsylvania, etc., Co.*, 124.
32. § 2758*a*. Statute of limitations. Prohibition to sue. Contract time. *Ward* v. *Pennsylvania, etc., Co.*, 124.
33. §§ 3014, 3016, 3017. Municipal bonds. Elections. Joint purposes. *Yazoo City* v. *Lightcap*, 148.
34. § 3039. Municipal charters. Amendments. *Yazoo City* v. *Lightcap*, 148.
35. § 3401. Privilege taxes. Contracts void. *Ward* v. *Pennsylvania, etc., Co.*, 124.

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CODE, 1892—*Continued.*

36. § 3421. Process. Summons. Publication only. Alimony. *Larson* v. *Larson*, 116.
37. § 3520. *Quo warranto.* School Trustee. Officer. *Ellis* v. *Greaves*, 36.
38. § 3559. Fellow servants. Master's negligence. Engineer. Firemen. *Gulf, etc., R. R. Co.* v. *Bussey*, 616; *Cheaves* v. *Southern Ry. Co.*, 48.
39. § 3561. Railroads. Plantation roads. Crossings. Maintainance. *Illinois, etc., R. R. Co.* v. *Denham*, 77.
40. § 3707. Replevin. Value. Jurisdiction. *Ball* v. *Sledge*, 749.
41. § 3757. Taxation. Money loaned. Non-residents. *Adams* v. *Colonial etc., Co.*, 263.
42. § 3784. Assessment rolls. Time for filing. Extension. Auditor. *Bennett* v. *Maxwell*, 70.
43. § 4008. Election of public school trustees. *Ellis* v. *Greaves*, 36.
44. § 4234. Business sign. Insurance. Garnishment. *Meridian, etc., Co.*, v. *Ormond*, 758.
45. § 4370. Criminal law. Objections. Exceptions. *Short* v. *State*, 473.
46. § 4461. Unlawful detainer. Lease. Stranger. *Hammel* v. *Atkinson*, 465.
47. § 4488. Will. Signature. *Sheehan* v. *Kearney*, 688.

COHABITATION.

Agreement. Married woman.

Cohabitation, however long continued, between a married woman and an unmarried man will not ripen into a valid common law marriage, although from the beginning they agreed to be husband and wife, and constantly thereafter claimed and held themselves out to the world to be married each to the other. *Blanks* v. *Southern Ry. Co.*, 703.

COMMON LAW.

Telegram. Message received in one state. Delivery in another. Contract. Conflict of laws. Statutes.

The rule that the validity of a contract made in one state, for the transmission and delivery of a dispatch in another, is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Postal, etc., Co.* v. *Wells*, 733.

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COMMON LAW MARRIAGE.

See COHABITATION.

Blanks v. *Southern R'y Co.*, 703.

CONCEALED WEAPONS.

See CRIMINAL LAW, 6,
WEAPONS, 1.

Murdin v. *State*, 507.

CONFESSIONS.

1 *Criminal law. Evidence. Inducements. Officers.*

A confession made to an officer, having the custody of the accused, after a statement by the latter to the former to the effect that he would tell the officer all about the crime if the officer would help him out, and a promise by the officer to do so, is inadmissible. *Mackmasters* v. *State*, 459.

2. *Same. Second confession. Presumption.*

When a first confession was not free and voluntary, but made under inducements or because of threats, subsequent confessions, although at the time they are made, no new inducement is offered or threat made, are not admissible in evidence unless clearly shown not to be attributable to the inducements or threats under which the first one was made. *Ib.*

3. *Same. Writing. Parol evidence. General objection.*

The introduction by the state of parol evidence of a written confession of crime will not constitute reversible error if no objection be made, nor will an objection made in terms so general as to obscure rather than present the point avail in such case. *Wright* v. *State*, 421.

CONFLICT OF LAWS.

Telegrams. Message received in one state. Delivery in another. Contract. Statutes. Common law.

The rule that a validity of a contract made in one state, for the transmission and delivery of a dispatch in another, is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Postal, etc., Co.* v. *Wells*, 733.

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Conservator of the peace—Constitutional law.

CONSERVATOR OF THE PEACE.

Criminal law. Evidence. Transcript of testimony. Code 1892, § 1463.

It is error on the trial of an indictment to permit the introduction by the state of several pages of the testimony before a conservator of the peace, taken and reduced to writing on a preliminary trial of the accused, when uncertified and no account is given of the missing pages. *Gamblin* v. *State*, 73.

CONSTITUTION, 1869.

Art. 8, sec. 1. Uniform school system. *Ellis* v. *Greaves*, 36.

CONSTITUTION, 1890.

1. § 88. Municipal charters. *Yazoo City* v. *Lightcap*, 148.
2. § 158. Chancellors. Interchange not prohibited. *First National Bank* v. *Bloch*, 197.
3. § 171. Justice of the peace. Jurisdiction. Foreign judgment. *McDugle* v. *Filmer*, 200.
4. § 193. Fellow-servants. Railroads. Master's negligence. Engineer. Firemen. *Cheaves* v. *Southern Ry. Co.*, 48; *Gulf, etc., R. R. Co.* v. *Bussey*, 616.
5. § 195. Telegraph companies. Common carriers. *Postal, etc., Co.* v. *Wells*, 733.
6. § 201. Uniform school system. *Ellis* v. *Greaves*, 36.
7. § 264. Jurors. Aliens. Objection after verdict. *Fulcher* v *State*, 630.
8. § The Constitution of 1890 was prospective and not retrospective. *Adams* v. *Dendy*, 135.

CONSTITUTIONAL LAW.

1. *Chancellors. Constitution* 1890, *sec.* 158. *Interchange. Code* 1892, § 458.

Code of 1892, § 458, authorizing chancellors to alternate and make temporary changes of their districts, is constitutional, although by Constitution of 1890, § 158, the legislature is expressly authorized to provide by law for the interchange of circuit judges and there is no like constitutional provision respecting chancellors. *First National Bank* v. *Bloch*, 197.

2. *Jurors. Disqualification. Aliens. Constitution* 1890, *sec.* 264. *Objection after verdict.*

Under Constitution 1890, § 264, providing that jurors must be qualified electors, able to read and write, but the want of qualification of a juror shall not vitiate a verdict, an objection that a juror was an alien and therefore not a qualified elector cannot be made after verdict. *Fulcher* v. *State*, 630.

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Constitutional law.

CONSTITUTIONAL LAW—*Continued.*

3. *Local laws. Constitution of* 1890.

Constitution 1890, being prospective, does not affect local laws, it being in force at the time of the adoption of the constitution. *Adams* v. *Dendy*, 135.

4. *Municipal charters. Constitution* 1890, *sec.* 88.

Constitution 1890, § 88, providing that the legislature shall pass general laws under which cities and towns may be chartered and their charters amended, merely requires the passage of uniform general laws prescribing the mode by which such charters may be granted and amended, and does not require that such laws shall contain the entire contents of charters and amendments. *Yazoo City* v. *Lightcap*, 148.

5. *Same. Code* 1892, § 3039. *Laws* 1900, *p.* 79, *ch.* 69.

Code 1892, § 3039, as amended, laws 1900, p. 79, ch. 69, authorizing the amendment of the charters of municipalities which have not adopted the code chapter on "municipalities," and allowing amendments inconsistent with said code chapter, is not violative of Constitution 1890, § 88, requiring the passage of general laws under which cities and towns may be chartered and their charters amended. *Ib.*

6. *Same. Delegation of legislative power.*

Laws 1900, p. 79, ch. 69, amending Code 1892, § 3039, so as to authorize amendments to charters of municipalities not operating under the code chapter on "municipalities" is not unconstitutional as delegating the exercise of legislative power. *Ib.*

7. *Railroad. Fellow servant. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

Constitution 1890, § 193, touching the application of the fellow-servant rule in the case of railroad employes, has no application to an action based on the negligence of the railroad company itself, in failing to provide a safe road bed. *Gulf, etc., R. R. Co.* v. *Bussey*, 616.

8. *Same. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559, *Fellow servants.*

Under Constitution 1890, § 193, and Code 1892, § 3559, providing that every employe of a railroad corporation shall have the same remedies for an injury suffered from the act or omission of the corporation or its employes as allowed to other persons not employes, where the injury results from the negligence of a su-

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CONSTITUTIONAL LAW—*Continued.*

perior agent or officer or one having the right to control the service of the party injured, a declaration in a suit by a fireman charging that he was injured by the negligence of the engineer who was a superior, having the right to control plaintiff's service (using the language of the constitution and statue in making a change) is not demurrable. *Cheaves v. Southern Ry. Co.*, 48.

9. *Statutes. Questioning validity. Estoppel. Laws* 1900, *ch.* 105. *Seizure of intoxicating liquors.*

Where intoxicating liquors were seized, under laws 1900, chapter 105, providing therefor, and a party claim the same in pursuance of the provisions of said statute, he is not in position to insist that the statute is unconstitutional because it does not provide for notice. *Quin* v. *State*, 75.

10. *Uniform system of public schools. Constitution* 1869, *art.* 8, *sec.* 1. *Constitution* 1890, *sec.* 201. *Departure from general school law.*

Constitution 1869, art. 8, sec. 1 (constitution 1890, sec. 201), making it the duty of the legislature to establish a uniform system of public schools, prohibited the appointment by legislative act of designated persons as trustees of a public school for a term of twenty years, and granting them power to fill vacancies in their number, exclusive control of the school and other powers not conferred on trustees of public schools generally. *Ellis* v. *Greaves*, 36.

11. *Same. Laws* 1888, *p.* 173, *ch.* 198. *Code* 1892, § 4008.

While Code 1892, § 4008, regulating the election of public school trustees generally, but providing that existing trustees of certain separate school districts should remain in office according to the terms of their appointment, did not supercede laws 1888, chapter 148, appointing and conferring extraordinary powers upon the trustees of the Hazlehurst public school, yet said act of 1888 was and is violative of constitution of 1869, art. 8, sec. 1 (constitution 1890, sec. 201), requiring a uniform system of public schools. *Ib.*

CONSTRUCTION.

1. *Chancery. Order appointing receiver. Construction. Exemption.*

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. *Levy* v. *Rossel*, 527.

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CONSTRUCTION—*Continued.*

2. *Lands. Contracts. Construction. Rescission.*

A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the contract:

(*a*) When the other party has evinced his intention to abandon or repudiate the contract entirely; or

(*b*) When the other party has breached the contract in a matter which is vital to its existence, or is of its essence by the terms of the contract, or the evident intention of the parties; or

(*c*) When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract, according to its terms, impossible. *Mortimer* v. *Hannah*, 645.

CONTRACT LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS, 1, 2, 3, 4.

Ward v. *Pennsylvania, etc., Co.*, 124.

CONTRACTS.

1. *Building and loan association. Stipulation. Final settlement. Rate of interest.*

Where a borrowing member of a building and loan association pledged his stock in the association and mortgaged other property as security for the loan, and the contract stipulated that "On the maturity of the stock so advanced upon, total payments of installments, interest and premiums shall not exceed the amount of the advance, with interest thereon at the highest contractual rate per annum allowed by the statutes of the state," the borrower is entitled to the benefit of the stipulation only on maturity of the stock. *Georgia State B. & L. Association* v. *Grant*, 424.

2. *Same.*

A provision in the by-law of a building and loan association that "where its loan contracts are governed by laws that limit the aggregate amount of premium and interest that can be taken on them, only so much of the premium collected shall be taken as profits by it as will, with the interest collected, equal and conform to the highest contractural rate of interest in such state, the balance of the premium being used at settlement" in reduction of the debt, gives the borrower the benefit thereof only on final settlement, after maturity of the stock. *Ib.*

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CONTRACTS—*Continued.*

debt, gives the borrower the benefit thereof only on final settlement, after maturity of the stock. *Georgia State B. & L. Association* v. *Grant*, 424.

3. *Building and loan association. Stockholders payments. Withdrawal fees.*

A complainant who seeks by suit to have the contract by which he, as a stockholder, borrowed money of a building and loan association declared usurious, is not entitled to have credited on the principal of his loan the sums paid by him in his character of stockholder on expense account or for fines and withdrawal fees. *Ib.*

4. *Corporations. Promoters. When corporation not liable.*

A corporation is not liable on contracts made by its promoters unless it adopts the same or receives their benefits. *Bank of Forest* v. *Orgill*, 81.

5. *Exemptions. Property devoted to creditors.*

A contract by mercantile partners, who are largely indebted, that their business shall be conducted by others, and that all money arising therefrom shall be applied pro rata to the debts of the partnership, with power in the succeeding managers to replenish the stock, but requiring that the proceeds of all sales shall be deposited in a bank and paid out ratably to the creditors, will preclude the partners from claiming an exemption in the property covered by the contract. *Levy* v. *Rossel*, 527.

6. *Fire insurance. Policy. Stipulation as to time within which to sue. Statute of limitations.*

Where a fire insurance policy provided that suit thereon must be brought, if at all, within a designated time, the provision is valid, and the time is not extended by the statute of limitations. *Ward* v. *Pennsylvania, etc., Co.*, 124.

7. *Same. Previous suits dismissed. Code* 1892, § 2756.

In such case where suit is brought after the expiration of the contract time it makes no difference that a previous suit, which was dismissed, had been brought within the time, nor is the case aided by Code 1892, § 2756, providing that if any action brought within the time limited by the statute of limitations be defeated for matter of form, or the judgment be arrested after verdict for plaintiff, he may bring a new action within a year from the abatement or other determination of the first suit. *Ib*

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Contracts.

CONTRACTS—*Continued.*

8. *Fire insurance. Privilege tax. Code* 1892, § 3401. *Amnesty act. Laws* 1902, *ch.* 55.

In such case a plaintiff who could not recover in a suit begun before the expiration of the contract time, because he had not paid his privilege tax (Code 1892, § 3401), and who consequently dismissed his suit, cannot recover in a second suit, begun after the expiration of the time, although he had, before bringing the latter suit, availed himself of the amnesty act (Laws 1902, ch. 55), relieving him from the consequences of not having paid the tax. *Ward* v. *Pennsylvania, etc., Co.*, 124.

9. *Same. Prohibition to sue. Injunction. Code* 1892, § 2758*a*.

In such case a plaintiff is not aided by code 1892, § 2758*a*, providing that when any person shall be prohibited by law or enjoined from commencing any action, the time during which he shall be so prohibited or enjoined shall not be computed as part of the time limited by the statute of limitations within which suit may be brought. *Ib.*

10. *Husband and wife. Code* 1892, § 2294. *Transfers of property. Third persons,*

A husband who manages his wife's farm, under a verbal understanding with her that he is to own the crops, is not the owner of cotton produced thereon and cannot maintain a suit for its negligent destruction by a third person, under Code 1892, § 2294, providing that a transfer of property between husband and wife shall not be valid as against third parties, unless it be in writing and filed for record, and that posession of the property shall not be equivalent to filing the writing for record. *Williams* v. *Yazoo, etc., R. R. Co.*, 659.

11. *Option. Vendor and vendee. Contract for conveyance.*

A contract to convey a strip of land across certain sections along a railroad, one hundred feet wide on either side of the track, as surveyed, located and staked, at any time within two years from date, when requested by the railroad company and upon the payment of a stipulated sum, is but an option. *Louisville, etc., R. R. Co.* v. *Gulf, etc., Improvement Co.*, 180.

12. *Partnership. Dissolution. Construction.*

A contract between a retiring partner and his co-partners by which they agree to pay him the balance of a designated sum of money not required to satisfy certain firm debts which they might be "compelled to pay," and in which they agree "to make any de-

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CONTRACTS—*Continued.*

fense that can be made" to said debts, does not forbid payment by the co-partners of said firm debts without suit, but leaves them free to pay what they were legally bound to pay and charge the retiring partner accordingly. *Rosenbaum* v. *Rosenbaum*, 454.

13. *Profits. When recovered. Established business.*

The anticipated profits of an established business, which would not be speculative, but the direct and immediate fruits attending the performance of a contract, may be recovered for its breach. *White* v. *Leatherberry*, 103.

14. *Rescision. Lands. Contracts. Construction.*

A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the contract:

(*a*) When the other party has evinced his intention to abandon or repudiate the contract entirely; or

(*b*) When the other party has breached the contract in a matter which is vital to its existence, or is of its essence by the terms of the contract or the evident intention of the parties; or

(*c*) When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract, according to its terms impossible. *Mortimer* v. *Hannah*, 645.

15. *Telegrams. Stipulations on back of message. Limiting liability. Constitution* 1890, *sec.* 195.

A stipulation on the back of a telegraph message to the effect that the company will not be liable, beyond the charge paid for the transmission, for mistakes in unrepeated messages or errors in transmitting cipher messages, is unavailing as a defense, under Constitution 1890, sec. 195, declaring telegraph companies common carriers in their line of business and subject to liability as such. *Postal, etc., Co.*, v. *Wells*, 733.

16. *Same. Message received in one state. Delivery in another. Conflict of laws. Statutes. Common law.*

The rule that the validity of a contract made in one state, for the transmission and delivery of a dispatch in another, is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Postal, etc., Co.* v. *Wells*, 733.

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CONTRACTS—*Continued.*

17. *Usury. Contract to waive. Public policy.*

A contract by a borrower to waive, directly or indirectly, the usury law is against public policy and void. *Georgia State B. & L. Association* v. *Grant*, 424.

CONTRIBUTORY NEGLIGENCE.

1. *Railroads. Fires. Storage of cotton near track.*

The storage of cotton bales in rows, tier above tier, with a passage way between the rows, ninety feet from a railroad track, tarpaulins being spread over the bales, but leaving part of the cotton near the ground unprotected, does not constitutte such contributory negligence as will defeat the owner's recovery from the railroad company for the negligent burning of the cotton. *Alabama, etc., Ry. Co.* v. *Aetna Insurance Co.*, 770.

2. *Same.*

Facts considered, and the defense of contributory negligence adjudged not to have been made out. *Gulf, etc., R. R. Co.* v. *Bussey*, 616.

CORPORATIONS.

Promoters. Contracts. When corporation not liable.

A corporation is not liable on contracts made by its promoters unless it adopts the same or receives their benefits. *Bank of Forest* v. *Orgill*, 81.

CORPUS DELICTI.

Criminal law. Poisoning food, drink, etc. Code 1892, § 1255. *Confession. Evidence.*

Under Code 1892, § 1255, making it a crime to mingle poison with any food, drink or medicine with intent to kill or injure any human being, the *corpus delicti* is the mingling of the poison with the food, drink or medicine, and the same cannot be proved alone by the confession of the accused. *Stanley* v. *State*, 498.

CREDITOR.

1. *Statute of limitations. Must be pleaded. Debtor.*

Unless the statute of limitations be pleaded by the debtor it is unavailing as a defense. *Anderson* v. *McNeal*, 542.

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Creditor—Civil law and procedure.

CREDITOR—*Continued.*

2. *Statute of limitations. Other creditors.*

The unsecured creditors of a debtor cannot compel him to plead the statute of limitations as a defense to his secured debt. *Anderson* v, *McNeal*, 542.

3. *Same. Mortgage to secure barred debts.*

A *bona fide* conveyance by a debtor to secure some of his creditors cannot be avoided by his other creditors without offering to pay the secured debts. *Ib.*

CRIMINAL LAW AND PROCEDURE.

1. *Bigamy. Indictment. Defense. Marriage, prior to first one charged.*

If the first marriage charged in an indictment for bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. *Lane* v. *State*, 555.

2. *Change of venue. Code* 1892, § 1411. *Two offenses.*

Where a defendant is indicted in the same county for two offenses and is entitled to a change of venue for the trial of one of them, under Code 1892, § 1411, regulating the subject, he should on his application be granted a change of venue for the trial of the other, if the connection between the offenses be such that the pre-judgment, grudge or ill-will which entitled him to the change granted, operate adversely to him in the other case, although the commission of the crime therein charged did not produce such pre-judgment, grudge or ill-will. *Owens* v. *State*, 31.

3. *Confessions. Evidence. Inducements. Officers.*

A confession made to an officer, having the custody of the accused, after a statement by the latter to the former to the effect that he would tell the officer all about the crime if the officer would help him out. and a promise by the officer to do so, is inadmissible. *Mackmasters* v. *State*, 459.

4. *Same. Second confession. Presumption.*

When a first confession was not free and voluntary, but made under inducements or because of threats, subsequent confessions, although at the time they are made no new inducement is offered or threat made, are not admissible in evidence unless clearly shown not to be attributable to the inducements or threats under which the first one was made. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

5. *Confessions. Writing. Parol evidence. General objection.*

The introduction by the state of parol evidence of a written confession of crime will not constitute reversible error if no objection be made, nor will an objection made in terms so general as to obscure rather than present the point avail in such case. *Wright* v. *State*, 421.

6. *Deadly weapons. Carrying concealed. Code* 1892, §§ 1620, 1027. *Threats. Instruction.*

Where the evidence on the trial of an accused for carrying a deadly weapon concealed, under Code 1892, §§ 1026, 1027, regulating the subject, showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed. *Murden* v. *State*, 507.

7. *Evidence. Conservator of the peace. Transcript of testimony. Code* 1892, § 1463.

It is error on the trial of an indictment to permit the introduction by the state of several pages of the testimony before a conservator of the peace, taken and reduced to writing on a preliminary trial of the accused, when uncertified and no account is given of the missing pages. *Gamblin* v. *State*, 73.

8. *False pretenses. Public school teacher. Indictment.*

An indictment against a public school teacher charging that, with intent to defraud the county, he made a false report to the county school superintendent for the second month of his school, upon the faith of which he was allowed a second assistant teacher for the third month, and that with intent to defraud, etc., he obtained a teacher's pay certificate for such assistant, is demurrable in the absence of a charge that the attendance on the school for the third month did not entitle defendant to the second assistant during said third month, and that the certificate was not compensation for services actually rendered by said assistant during the third month. *State* v. *Mortimer*, 443,

9. *Homicide. Evidence.*

In the absence of evidence of a conspiracy, the statement of a third party, not made in the presence of the accused, to the effect that "they" were not going to prosecute the deceased for assaulting the defendant, but "were going to get him," is not admissible on the trial of the defendant for afterwards killing deceased. *Pulpus* v. *State*, 548.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

10. *Homicide. Co-defendant's escape.*

On the trial of a defendant for homicide it is error to permit the state to prove that a co-defendant, not on trial, had left the state and forfeited his bail bond. *Pulpus* v. *State*, 548.

11. *Same. Self-defense. Surrender of right.*

The right of self-defense is not surrendered, although defendant armed himself with a deadly weapon and sought his adversary with intent to kill him and was the aggressor in the altercation in which he killed him, if after the beginning of the altercation defendant abandoned the intent and the killing was not in pursuance of it. *Ib.*

12. *Grand jury. Influenced by court. Indictment quashed. Code* 1892, §§ 1120, 1121. *Dealing in futures.*

It is sufficient ground for the quashal of a subsequently returned indictment (under Code 1892, §§ 1120, 1121, making it a crime to deal in futures) that the grand jury sought to be finally discharged without indicting defendant and the court refused to discharge them, and thereupon instructed them specifically touching the criminal character of defendant's business, saying that the law was plain and the court of opinion that they had sufficient evidence to find an indictment, that other grand juries had indicted, and that the business in which defendant was engaged was a flagrant violation of the statute. *Blau* v. *State*, 514.

13. *Intent to wound. Intent to kill. Intent to murder.*

An intent to wound is not an intent to murder, nor is an intent to kill necessarily an intent to murder. *Thames* v. *State*, 667.

14. *Same. Instruction. Assault with intent to murder.*

An instruction for the state in a prosecution for an assault with intent to kill and murder is fatally erroneous, if it assume an intent to wound, or an intent to kill to be the same as an intent to murder. *Ib.*

15. *Intoxicating liquors. Procuring for inebriate. Knowledge. Code* 1899, § 1594.

Knowledge is not of the essence of the offense created by Code 1892, § 1594, making it unlawful to procure intoxicants for one in the habit of becoming intoxicated. *Jenkins* v. *State*, 500.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

16. *Intoxicating liquors. Indictment. Surplusage.*

If it be charged in an indictment for such offense that the accused knew that the person for whom the intoxicants were procured was in the habit of becoming intoxicated, and that the accused was not his parent or guardian and did not stand in loco parentis to such person, the averments are surplusage and need not be proved. *Jenkins* v. *State*, 500.

17. *Same. Actual delivery.*

It is unnecessary to prove in such case that the defendant actually delivered the intoxicants to the inebriate for whom they were procured, since one can procure an article for another without making the actual delivery. *Ib.*

18. *Jurors. Competency. Code* 1892, § 2355.

Under Code 1892, § 2355, providing that any person otherwise competent who will make oath that he is impartial shall be competent as a juror in any criminal case, although he has an impression or opinion as to the guilt of the accused, if it appear to the court that he has no bias and no desire to reach any result except that to which the evidence may conduct, the oath of the proffered juror is not conclusive, nor is he the judge of his own competency. *Fugate* v. *State*, 189.

19. *Same.*

A person is not qualified as a juror:

(*a*) Who has an opinion about the case and cannot say positively that he can try the case as though he had none; or

(*b*) Who has an opinion about the case and from what he knows could bring in a verdict (other than one predicated of a want of further knowledge) without further evidence; or

(*c*) Who has an opinion about the case which it would require strong testimony to remove. *Ib.*

20. *Same. Disqualification. Aliens. Constitution* 1890, *sec.* 264. *Objection after verdict.*

Under Constitution 1890, § 264, providing that jurors must be qualified electors, able to read and write, but the want of qualification of a juror shall not vitiate a verdict, an objection that a juror was an alien and therefore not a qualified elector cannot be made after verdict. *Fulcher* v. *State*, 630.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

21. *Jurors. Absence of knowledge.*

In the absence of the showing that the facts of which an objection to a juror is predicated were unknown to the objecting party and his counsel when the juror was accepted on the panel, the objection will be unavailing. *Fulcher* v. *State*, 630.

22. *Larceny. Temporary use.*

The taking of property, without the owner's consent, merely for temporary use, without intent to deprive him permanently of his goods, does not constitute larceny of the goods. *Leland* v. *State*, 182.

23. *Murder. Accessory before the fact. Code* 1892, § 950. *Sudden altercation. Instruction.*

Where the state proceeds in a murder case on the theory that the defendant was an accessory before the fact (under the statute Code of 1892, § 950, a principal) and had armed and instigated an hireling to aid two other persons in committing the murder, it was error to refuse defendant an instruction, there being testimony of which to predicate it, directing the jury to acquit, if they believed from the evidence that the hireling killed deceased, not in pursuance of defendant's instigation, but alone because of a sudden and unexpected altercation between deceased and one of the two persons mentioned. *Owens* v. *State*, 18.

24. *Same. Instruction. Self-defense.*

An instruction in a murder case is erroneous which denies defendant the right of self-defense, although he may have armed himself with a deadly weapon, intending to use it if necessary, and have been the aggressor in and provoker of the difficulty in which he killed deceased; the defendant had the right to abandon such intent and to show that the killing was not in pursuance of it. *Rogers* v. *State*, 479.

25. *Same. Instruction must be predicated of evidence.*

An instruction, in the absence of evidence of which to predicate it, is erroneous. *Ib.*

26. *Same. Instruction. Self-defense.*

In a murder case a defendant's instruction to the effect that the jury must acquit if there be a reasonable doubt whether at the time the deceased was struck by defendant he was attempting to strike defendant with a hoe, may be properly modified by adding thereto the words, "If you believe the hoe was a

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

deadly weapon in the hands of deceased, and that it was really or apparently necessary for the defendant to strike to protect himself." *Fulcher* v. *State*, 630.

27. *Poisoning food, drink, etc. Code* 1892, § 1255. *Corpus delicti. Confession. Evidence.*

Under Code 1892, § 1255, making it a crime to mingle poison with any food, drink or medicine with intent to kill or injure any human being, the *corpus delicti* is the mingling of the poison with the food, drink or medicine, and the same cannot be proved alone by the confession of the accused. *Stanley* v. *State*, 498.

28. *Rape. Evidence. Reputation for chastity.*

In a prosecution for rape it is error to permit the state to show:

(*a*) That prosecutrix was a chaste woman, her general reputation in that regard now having been assailed by defendant;

(*b*) That defendant ill treated members of his household, where such evidence does not tend to explain delay in the prosecution;

(*c*) That a witness not called by the defense had been told by defendant that she would have to swear lies to help him out; and

(*d*) That witness had heard noises indicating distress at defendant's house, they not knowing what made the noises or why they were made. *Baker* v. *State*, 84.

29. *Same. Delay in prosecution.*

Long delay in prosecuting for rape demands a close scrutiny of the testimony before conviction. *Ib.*

30. *Same. Larceny. Other offenses.*

On the trial of an indictment for rape it is error to admit evidence of the commission of larceny by the accused, such evidence not being necessary to identify the defendant and there being no connection between the offenses. *Dabney* v. *State*, 252.

31. *Same. Evidence of other offenses. Benefit of doubt.*

The general rule is that evidence of other crimes than the one for which the accused is being tried is inadmissible, and if it be doubtful whether such evidence falls within any of the exceptions to the rule it should be excluded. *Ib.*

32. *Same.*

Discussion of exceptions to the general rule. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

33. *Rape. Passive resistance. Silent objection.*

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent, unless she be overcome by drugs, or other means. *Anderson* v. *State*, 784.

34. *Same. Evidence. Prosecutrix's declarations.*

Upon the trial of an indictment for rape, the state may show that the prosecutrix made complaint of her injury shortly after the assault upon her, but may not show the particulars stated by her, nor that she charged defendant with the wrong. *Ib.*

35. *Same. Alibi.*

It is prejudicial error on a trial for rape to permit the declarations of the prosecutrix touching the particulars of, and charging defendant with, the wrong to be given in evidence, although the defense be an alibi. *Ib.*

36. *Robbery. Indictment. Code* 1892, § 1284.

Under Code 1892, § 1284, defining robbery as the felonious taking of the personal property of another in his presence or from his person and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, an indictment seeking to charge a robbery by taking property from the person of another by putting him in fear, etc., is fatally defective if it omit to charge either that the person said to have been robbed was put in fear of some immediate danger to his person or that the property was taken from his person. *Smith* v. *State*, 793.

37. *Seduction. Chastity of woman. Code* 1891, § 1298.

Under Code 1892, § 1298, making it a crime to seduce a woman over sixteen years of age by virtue of any feigned or pretended marriage or false promise of marriage, the previous chaste character of the woman is an essential element of the crime. *Fooshee* v. *State*, 509.

38. *Same. Absent witness. Attachment. Not found.*

The return of "not found" on an attachment for an absent witness does not necessarily warrant the denial of a continuance on account of his absence. *Ib.*

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CRIMINAL LAW AND PROCEDURE—*Continued.*

39. *Supreme court practice. Code* 1892, § 4370. *Objections must be seasonable.*

Exceptions in the trial court, not jurisdictional in their nature, must be seasonably made to prevent the application of Code 1892, § 4370, providing that a judgment in a criminal case shall not be reversed because of any error in the court below, unless the record show that the error complained of was made ground of special exception in that court. *Short* v. *State*, 473.

40. *Same. Want of arraignment. Arrest of judgment.*

An exception predicated of the fact that the defendant in criminal case was not formally arraigned, not being jurisdictional, is not seasonably made if presented for the first time by a motion in arrest of judgment. *Ib.*

41. *Verdict. Ambiguity.*

Where the terms of a verdict are ambiguous the court is authorized and under a duty to have the jury make their meaning plain. *Owens* v. *State*, 18.

42. *Same.*

In a murder case, the jury being authorized upon conviction to fix defendant's punishment at imprisonment for life in the penitentiary, a verdict in these words, "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court," is insufficient to support a judgment sentencing defendant to the penitentiary for life, each juror having stated upon the return of the verdict, in response to the court, that he did not mean that a death sentence should be imposed and most of them that the word "term" in the verdict meant less than life imprisonment. *Ib.*

43. *Witness. Inducement to testify.*

Where a state's witness, who had been convicted of the crime, stated upon cross-examination on the trial of his co-defendant that no inducement had been offered him to testify as he had done, the state should not be permitted to prove the truth of the statement by the prosecuting attorney. *Ib.*

CROSSINGS.

See RAILROADS, 1, 2.

Illinois, etc., R. R. Co. v. *Denham*, 77.

Yazoo, etc., R. R. Co. v. *Watson*, 89

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DAMAGES.

1. *Excessive.*

A verdict for four thousand dollars against a city in favor of a professional midwife and nurse, sixty-three years of age, for falling into a sewer ditch because of a defective temporary bridge, is excessive, in the absence of satisfactory evidence as to the extent and duration of her injuries. *City of Jackson* v. *Carver*, 583.

2. *Instructions construed together.*

An instruction limiting the jury, if they find for plaintiff, in assessing damages to a consideration of the instructions given for the plaintiff ignoring the instruction on the subject given for the defendant, is erroneous, since all the instructions on the subject should be considered and construed together. *Yazoo, etc., R. R. Co.* v. *Smith*, 656.

3. *Profits. When recovered. Established business.*

The anticipated profits of an established business, which would not be speculative, but the direct and immediate fruits attending the performance of a contract, may be recovered for its breach. *White* v. *Leatherberry*, 103.

4. *Punitive damages.*

It is not error to refuse plaintiff an instruction authorizing the jury to award punitive damages when such damages would not be justified under any view of the facts of the case. *Yazoo, etc., R. R. Co.* v. *Smith*, 656.

5. *Same. Railroads. Flag stations. Failure to stop. Ignoring signals.*

Where the engineer of a passenger train saw and understood, but disregarded a signal to stop at a flag station when it was his duty to have stopped, and no reasonable explanation of his failure to stop is made, a question of fact is presented for the jury to determine whether his acts were characterized by malice, willfulness, wantonness, etc., justifying the award of exemplary damages. *Yazoo, etc., R. R. Co.* v. *White*, 120.

6. *Same. Instructions.*

In such case the plaintiff having asked and received an instruction to the effect that the jury might award exemplary damages if they believed the failure to stop was willful, reckless or capricious, it was error for the court to refuse an instruction asked for by defendant directing the jury not to award exemplary damages if the engineer did not act maliciously, deliberately, willfully or wantonly. *Ib.*

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Damages.

DAMAGES—*Continued.*

7. *Special damages. Pregnancy. Want of notice.*

Although a telegraph company failed to seasonably deliver a message from a wife to her husband, she cannot therefor recover an item of special damage which resulted alone from the fact that she was pregnant, in absence of evidence that the company had notice of her condition. *Western, etc., Co.* v. *Pearce*, 487.

8. *Telegraph company. Wilful delay. Punitive damages. Message announcing death.*

Where a telegraph company received for transmission and delivery a message to a woman announcing the death of her husband, but failed to deliver the same for several days, its failure being without excuse and so negligent as to amount to willfulness, it is liable to the sendee for punitive, as well as actual, damages. *Western, etc., Co.* v. *Watson*, 101.

9. *Same. Actual damage.*

In such case the plaintiff cannot recover an item of actual damage not shown to have been suffered. *Ib.*

10. *Trespass. Sum demanded. Instruction not to exceed.*

It is not erroneous in an action of trespass for damages for the court to instruct the jury at plaintiff's request that they cannot award greater damages than the sum demanded in the declaration. *Gulf, etc., R. R, Co.* v. *Nelson*, 653.

11. *Unliquidated damages. Writ of inquiry.*

A judgment of a Tennessee justice of the peace cannot be assailed where sued upon in this state because it was rendered by default upon an unliquidated demand and the record does not show the award of a writ of inquiry to fix damages as required by the statutes of Tennessee (Shannon's Code, § 4679), since by the same statutes (§ 5988) it is provided that every intendment is in favor of the validity of proceedings before justices of the peace. *McDugle* v. *Filmer*, 200.

12. *Verdicts. Whims of jurors. Instruction.*

Verdicts should be based on the facts of the case, not upon the whims or wishes, likes or dislikes, of the jurors; and an instruction authorizing the jury, if they find for plaintiff, to award such damages "as the jury shall see fit to assess," is erroneous. *Yazoo, etc., R. R. Co.* v. *Smith*, 656.

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DEADLY WEAPONS.

See WEAPONS, 1, 2.

Stone v. *Heggie*, 410.

Murdin v. *State*, 507.

DEBTOR AND CREDITOR.

See PAYMENT.

Ball v. *Sledge*, 749.

DECREES AND JUDGMENTS.

See ALIMONY.

PROCESS, 1.

Larson v *Larson*, 116.

DEEDS.

1. *False recital. County of location. Tax collector. Power.*

A deed to an eighty-acre tract of land, accurately described by governmental survey description, executed by the owner, will convey the whole tract, although it be recited in the conveyance to be situated in a designated county when only a part thereof is so situated; but a tax collector's deed under such circumstances does not convey lands without his county. *Morrison* v. *Casey*, 522.

2. *Easement. Ejectment. Right of way. Possession.*

The owner of the legal title to a strip of land may maintain ejectment therefor against a defendant exercising exclusive possession thereof, although the latter have a right of way over the same. *Lott* v. *Payne*, 218.

3. *Same.*

A deed to a strip of land limiting the grantees' interest to "a private easement or for street purposes only," does not authorize the grantee to take exclusive possession of the land. *Ib.*

4. *Life estate. Conveyance by remainderman. Construction. Estoppel.*

Where a son owned under a trust deed executed by his father the exact interest in lands which he would have inherited, on the death of his father intestate, had the deed not been executed, and after the death of the father conveyed, for a valuable consideration, all the interest he had in the lands "as heir of his father," he will not be permitted in equity to retain the consideration received and claim that his conveyance was wholly inoperative, but his deed will be construed as conveying his interest in the land. *Archer* v. *Yazoo, etc., R. R. Co.*, 110.

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DEEDS—*Continued.*

5, *Recitals in deed.*

The recitals of a sheriff's and tax collector's deed, made under a statute, are insufficient to prove the jurisdictional facts authorizing a sale thereunder. *Weiner* v. *Dickerson*, 63.

6. *Same. Value of neighboring land.*

Deeds to neighboring lands are not admissible in evidence in condemnation proceedings, although by their recitals they show the considerations paid for the lands conveyed by them. *Leves Commissioners* v. *Nelms*, 416.

7. *Tenants in common. Conveyance by one. Specific part. Rights of cotenants. Effect of deed. Estoppel.*

A deed from one tenant in common to a specific part of a general tract of land owned by several:

(*a*) Is inoperative to impair any of the rights of the grantor's cotenants.

(*b*) But, if the part so conveyed be allotted upon partition to the grantor in the deed, the grantee will take the same by estoppel; he will not, however, be invested with an interest in any part of the general tract not conveyed by the deed. *Kenoye* v. *Brown*, 607.

8. *Undue influence. Confidential friend. Invalid grantor. Family physician.*

A deed from an invalid, credulous and weak-minded old woman, prepared by the attorney of the grantee, purporting to convey her entire estate, a parcel of land, with the reservation of a life estate in the grantor, to her family physician and confidential friend, in consideration of care and medical attention and fifty dollars, is void, in the absence of evidence showing that the transaction was free from fraud and undue influence. *Norfleet* v. *Beall*, 538.

DEEDS OF TRUST.

1. *Administrator. Purchaser.*

An administrator may buy lands which belonged to his intestate from a purchaser, who, in good faith, acquired the title thereto at a valid sale under a deed of trust executed by the intestate. *O'Brien* v. *Wilson*, 93.

2. *Sale under. Trustee's compensation. Attorney's fees.*

If a deed of trust be enforced by the trustee making sale of the property, he is entitled to retain from the proceeds for his serv-

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DEEDS OF TRUST—*Continued.*

ices only a reasonable compensation to himself as trustee, although the note evidencing the debt secured by the deed stipulates for the payment of an attorney's fee in case it be collected by an attorney and the trustee is an attorney and a member of a firm of attorneys to whom the payee intrusted the note for collection. *Elkins* v. *Rives*, 744.

DEFAULT.

See GARNISHMENT, 2.

Work v. *Waggoner*, 591.

DELIVERY.

See CARRIERS, 11, 12.

Johnson v. *Gulf, etc., R. R. Co.*, 452.

See INTOXICANTS, 5.

Jenkins v. *State*, 500.

DEMURRAGE.

1. *Railroads. Carriers of freight. Rules.*

A railroad can make and enforce rules imposing reasonable demurrage charges on consignees for delay in unloading cars. *New Orleans, etc., R. R. Co. v. George*, 710.

2. *Same. Lien for demurrage. Code* 1892, § 2108.

Code 1892, § 2108, giving a carrier a lien for freight and storage, with power to sell therefor, applies to demurrage for delay in unloading cars. *Ib.*

3. *Same. Notice.*

Formal notice is unnecessary to make a consignee liable for demurrage charges, if he knows of the arrival of the cars for him. *Ib.*

4. *Same. Private sidings. Delivery, when full. Partnership sidings.*

Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding be full, the road offering the cars would have made the delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding. *Ib.*

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DEMURRAGE—*Continued.*

5. *Railroads. On certain freight. Not on all.*

A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds. *New Orleans, etc., R. R. Co.*, v. *George*, 710.

6. *Same. Several cars. Enforced on one for all.*

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against its contents separately, but enough may be retained to satisfy the charge against all. *Ib.*

DEPOSITIONS.

Witness. Evidence. Physician. Code 1892, § 1747.

The fact that the witness is a physician, living in another county, having a large practice and whose professional engagements are so much more than ordinarily numerous as to render it likely that he will be unable to attend court, does not authorize the taking of his deposition, under Code 1892, § 1747, providing that the deposition may be taken of a witness who is about to depart from the state, or who, by reason of age, sickness, or "other cause," shall be unable, or likely to be unable, to attend court. *American Express Co.* v. *Bradford*, 130.

DESCRIPTION.

See DEEDS, 1.

Morrison v. *Casey*, 522.

DEVISAVIT VEL NON.

1. *Will. Insanity. Burden of proof.*

Where on an issue of *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *King* v. *Rowan*, 1.

2. *Same. Instruction. Reasonableness or unreasonableness of will.*

Upon an issue of *devisavit vel non* an instruction for contestants is erroneous if it authorize the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will. *Ib.*

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DEVISAVIT VEL NON—*Continued.*

3. *Will. Contest. Burden of proof. Probation prima facie.*

The burden of proof is on the proponents of a will on an issue *devisavit vel non* both as to testamentary capacity and undue influence, but they make out their case prima facie by showing the due probation of the will. *Sheehan* v. *Kearney*, 688.

4. *Same. Evidence in rebuttal.*

After contestants have introduced their evidence on the issue *devisavit vel non* to meet the *prima facie* case made by showing the due probation of the will, the proponents may introduce evidence in rebuttal. *Ib.*

DOGS.

Railroads. Seen on track. Duty of engineer. Carelessness. Wilfulness.

If the engineer of a railroad train saw, or should have seen, a bloodhound trailing along the track a short distance in advance of the train, and having time to do so, does not give warning or do anything to prevent his engine from striking the animal and thereby causes it to be run over and killed by the train, his carelessness amounts to design and the railroad company will be liable to the owner for the value of the dog. *Kansas City, etc., R. R. Co.* v. *Hawkins*, 209.

EASEMENTS.

1. *Deeds. Ejectment. Right of way. Possession.*

The owner of the legal title to a strip of land may maintain ejectment therefor against a defendant exercising exclusive possession thereof, although he have a right of way over the same *Lott* v. *Payne*, 218.

2. *Same.*

A deed to a strip of land limiting the grantees interest to "a private easement or for street purposes only," does not authorize the grantee to take exclusive possession of the land. *Ib.*

EJECTMENT.

1. *Deeds. Easement. Ejectment. Right of way. Possession.*

The owner of the legal title to a strip of land may maintain ejectment therefor against a defendant exercising exclusive possession thereof, although the latter have a right of way over the same. *Lott* v. *Payne*, 218.

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EJECTMENT—*Continued.*

2. *Deeds. Easement. Ejectment. Right of way. Possession.*

A deed to a strip of land limiting the grantees interest to "a private easement or for street purposes only," does not authorize the grantee to take exclusive possession of the land. *Lott* v. *Payne*, 218.

3. *Homestead. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her when he executed the deed to the plaintiff. *Larson* v. *Larson*, 116.

ELECTION (EQUITABLE).

1. *Equity. Foundation of doctrine.*

The doctrine of equitable election is based on the principle that he who seeks equity must do equity. *Barrier* v. *Kelly*, 233.

2. *Same. Estoppel. Facts constituting.*

Where a mother, supposing in good faith that she owned an undivided one-half interest in lands, which in fact belonged to her elder son, conveyed the same to a trustee for her younger son when he became of age, and at the same time and as a part of the same transaction the mother conveyed other property to the same trustee for the elder son when he became of age, and the elder son upon reaching majority claimed and received of the trustee all the property conveyed in the deed made for his benefit and enjoyed the same, without objection, for four years thereafter, he is estopped from assailing the title of the younger son to the half interest in the lands. *Ib.*

3. *Same.*

In such case had the property conveyed to the use of the elder son exceeded the value of his lands conveyed by the mother to the use of the younger son the elder son might by timely proceedings have canceled the younger son's title and regained his lands upon surrender of so much only of the property conveyed to his use as equaled the value of his lands. *Ib.*

4. *Same. Pleadings. Construed strongest against pleader.*

In such case, since pleadings are construed most strongly against the pleader, a bill by the elder son to cancel the deed, made by the mother to the use of the younger son, which does not show the value of the property received by the complainant under the deed made to his use is demurrable. *Ib.*

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Elections—Eminent domain.

ELECTIONS.

Municipal bonds. Election. Joint purposes. Code 1892, §§ 3014, 3016, 3017.

A municipality may order an election under Code 1892, § 3014, *et seq.*, submitting to the voters as a single proposition the issuance of bonds for two or more purposes. *Yazoo City* v. *Lightcap*, 148.

See PRIMARY ELECTIONS, 1, 2.

State ex rel, etc., v. *Abbay*, 559.

EMINENT DOMAIN.

1. *Value of land. Evidence. Opinion of non-expert.*

In an eminent domain proceeding, it is competent for a witness familiar with the land sought to be taken, to testify about crops which had been produced on it, its location, distance from transportation facilities, and the character of the soil, and therefrom to give his opinion of its value, although he is not an expert. *Board of Levee Commissioners* v. *Nelms*, 416.

2. *Same. Deeds. Recitals of value of neighboring land.*

Deeds to neighboring lands are not admissible in evidence in condemnation proceedings, although by their recitals they show the considerations paid for the lands conveyed by them. *Ib.*

3. *Same. Sales of neighboring land.*

Sales of neighboring lands of like quality as that sought to be condemned, and prices actually paid, may be proved in condemnation proceedings, in order to weaken opinions of value. *Ib.*

4. *Same opinions of land values. No sales.*

Opinion evidence of the value of the lands sought to be taken is admissible in condemnation proceedings, although no sales of neighboring lands have been made. *Ib.*

5. *Same. Laws* 1887, *ch.* 19, *p.* 22.

Under laws 1897, Laws, chap. 19, pp. 22-29, regulating eminent domain proceedings by the Board of Levee Commissioners for the Yazoo & Mississippi Delta:

(*a*) The jury must find for the land owner where the appraisers have awarded him damages, and he has appealed to the circuit court.

(*b*) A verdict for the land owner must, under section 9 of the act, be itemized.

(*c*) The sum awarded a tenant for his leasehold is not to be deducted from the sum awarded to the owner of the fee. *Ib.*

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Equity—Estoppel.

EQUITY.

See CHANCERY COURTS.

Larson v. *Larson*, 116.
First National Bank v. *Bloch*, 197.
Barrier v. *Kelly*, 233.
Winner v. *Brandon*, 767.
Levy v. *Rossel*, 68.
Levy v. *Rossel*, 527.
Armistead v. *Barber*, 788.
Dickerson v. *Askew*, 436.

ESTOPPEL.

1. *Conduct. Divestiture of title. Absence of fraud.*

In the absence of fraud, misrepresentation, culpable silence, or their equivalent, a party cannot by estoppel be divested of title to real estate. *Thomas* v. *Romano*, 256.

2. *Same. Falsehood. Knowledge of facts.*

An equitable estoppel can be predicated of conduct only where the party sought to be estopped acts with full knowledge of the facts, unless he asserts to be true that which he does not know to be true, and his adversary relies upon the statement and thereby suffers injury. *Ib.*

3. *Constitutional law. Statutes. Questioning validity. Laws* 1900, *ch.* 105. *Seizure of intoxicating liquors.*

Where intoxicating liquors were seized, under Laws 1900, chapter 105, providing therefor, and a party claim the same in pursuance of the provisions of said statute, he is not in position to insist that the statute is unconstitutional because it does not provide for notice. *Quin* v. *State*, 75.

4. *Equity. Election. Foundation of doctrine.*

The doctrine of equitable election is based on the principle that he who seeks equity must do equity. *Barrier* v. *Kelly*, 233.

5. *Same. Facts constituting.*

Where a mother, supposing in good faith that she owned an undivided one-half interest in lands, which in fact belonged to her elder son, conveyed the same to a trustee for her younger son when he became of age, and at the same time and as a part of the same transaction the mother conveyed other property to the same trustee for the elder son when he became of age, and the

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ESTOPPEL—*Continued.*

elder son upon reaching majority claimed and received of the trustee all the property conveyed in the deed made for his benefit and enjoyed the same, without objection, for four years thereafter, he is estopped from assailing the title of the younger son to the half interest in the lands. *Barrier* v. *Kelly*, 233.

6. *Equity. Facts constituting.*

In such case had the property conveyed to the use of the elder son exceeded the value of his lands conveyed by his mother to the use of the younger son the elder son might, by timely proceedings, have canceled the younger son's title and regained his lands upon surrender of so much only of the property conveyed to his use as equaled the value of his lands. *Ib.*

7. *Same. Pleadings. Construed strongest against pleader.*

In such case, since pleadings are construed most strongly against the pleader, a bill by the elder son to cancel the deed, made by the mother to the use of the younger son, which does not show the value of the property received by the complaint under the deed made to his use, is demurrable. *Ib.*

8. *Life estate. Conveyance by remainderman. Construction.*

Where a son owned under a trust deed executed by his father the exact interest in lands which he would have inherited on the death of his father intestate, had the deed not been executed and after the death of the father conveyed, for a valuable consideration, all the interest he had in the lands "as heir of his father," he will not be permitted in equity to retain the consideration received and claim that his conveyance was wholly inoperative, but his deed will be construed as conveying his interest in the land. *Archer* v. *Yazoo, etc., R. R. Co.*, 110.

EVIDENCE.

1. *Chancery practice. Oral. Code* 1892, § 1764. *Equity cause.*

Under Code 1892, § 1764, providing that "in all proceedings in matters testamentary and of administration, in minors' business and in cases of persons of unsound mind, and on the hearing of motions to confirm sales and in similar cases," witnesses may be examined orally in the chancery court, but further providing that "this shall not change the rule as to . . . cases in which depositions generally are authorized," the two clauses must be construed together, and so construing the section, the taking of oral proof on notice in an equity case to enforce a vendors' lien is not authorized. *Dickerson* v. *Askew*, 436.

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Evidence.

EVIDENCE—*Continued.*

2. *Chancery practice. Oral testimony. Notice. Agreement. Code* 1892, § 1764.

In the absence of notice or agreement oral testimony is not admissible in the chancery court in a proceeding by an administrator to require the delivery of personal property to him, under Code 1892, § 1764, providing for the examination of witnesses in open court under certain conditions. *Winner* v. *Brandon*, 767.

3. *Same. Probate court jurisdiction.*

The code section, Code 1892, § 1764, is restrictive and not enlarging, and requires a notice or agreement in writing in matters which were of probate court jurisdiction before the adoption of the Constitution of 1869. *Ib.*

4. *Criminal law. Confessions. Inducements. Officers.*

A confession made to an officer, having the custody of the accused after a statement by the latter to the former to the effect that he would tell the officer all about the crime if the officer would help him out, and a promise by the officer to do so, is inadmissible. *Mackmasters* v. *State*, 459.

5. *Same. Second confession. Presumption.*

When a first confession was not free and voluntary, but made under inducements or because of threats, subsequent confessions, although at the time they are made, no new inducement is offered or threat made, are not admissible in evidence unless clearly shown not to be attributable to the inducements or threats under which the first one was made. *Ib.*

6. *Same. Confession. Writing. Parol evidence. General objection.*

The introduction by the state of parol evidence of a written confession of crime will not constitute reversible error if no objection be made, nor will an objection made in terms so general as to obscure rather than present the point avail in such case. *Wright* v. *State*, 421.

7. *Same. Conservator of the peace. Transcript of testimony. Code* 1892, § 1463,

It is error on the trial of an indictment to permit the introduction by the state of several pages of the testimony before a conservator of the peace, taken and reduced to writing on a preliminary trial of the accused, when uncertified and no account is given of the missing pages. *Gamblin* v. *State*, 73.

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Evidence.

EVIDENCE—*Continued.*

8. *Criminal law. Homicide.*

In the absence of evidence of a conspiracy, the statement of a third party, not made in the presence of the accused, to the effect that "they" were not going to prosecute the deceased for assaulting the defendant, but "were going to get him," is not admissible on the trial of the defendant for afterwards killing deceased. *Pulpus* v. *State*, 548.

9. *Same. Co-defendant's escape.*

On the trial of a defendant for homicide it is error to permit the state to prove that a co-defendant, not on trial, had left the state and forfeited his bail bond. *Ib.*

10. *Same. Self-defense. Surrender of right.*

The right of self-defense is not surrendered, although defendant armed himself with a deadly weapon and sought his adversary with intent to kill him and was the aggressor in the altercation in which he killed him, if after the beginning of the altercation defendant abandoned the intent and the killing was not in pursuance of it. *Ib.*

11. *Same. Rape. Larceny. Other offenses.*

On the trial of an indictment for rape it is error to admit evidence of the commission of larceny by the accused, such evidence not being necessary to identify the defendant and there being no connection between the offenses. *Dabney* v. *State*, 252.

12. *Same. Other offenses. Benefit of doubt.*

The general rule is that evidence of other crimes than the one for which the accused is being tried is inadmissible, and if it be doubtful whether such evidence falls within any of the exceptions to the rule it should be excluded. *Ib.*

13. *Same.*

Discussion of exceptions to the general rule. *Ib.*

14. *Same. Rape. Passive resistance. Silent objection.*

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent, unless she be overcome by drugs, or other means. *Anderson* v. *State*, 784.

15. *Same. Prosecutrix's declarations.*

Upon the trial of an indictment for rape, the state may show that the prosecutrix made complaint of her injury shortly after the assault upon her, but may not show the particulars stated by her, nor that she charged defendant with the wrong. *Ib.*

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Evidence.

EVIDENCE—*Continued.*

16. *Same. Alibi.*
It is prejudicial error on a trial for rape to permit the declarations of the prosecutrix touching the particulars of, and charging defendant with, the wrong to be given in evidence, although the defense be an alibi. *Anderson* v. *State*, 784.

17. *Same. Rape. Reputation for chastity.*
In a prosecution for rape it is error to permit the state to show:
(*a*) That prosecutrix was a chaste woman, her general reputation in that regard not having been assailed by defendant;
(*b*) That defendant ill treated members of his household, where such evidence does not tend to explain delay in the prosecution;
(*c*) That a witness not called by the defense had been told by defendant that she would have to swear lies to help him out; and
(*d*) That witness had heard noises indicating distress at defendant's house, they not knowing what made the noises or why they were made. *Baker* v. *State*, 84.

18. *Same. Delay in prosecution.*
Long delay in prosecuting for rape demands a close scrutiny of the testimony before conviction. *Ib.*

19. *Deed. Undue influence. Confidential friend. Invalid grantor. Family physician.*
A deed from an invalid, credulous and weak-minded old woman, prepared by the attorney of the grantee, purporting to convey her entire estate, a parcel of land, with the reservation of a life estate in the grantor, to her family physician and confidential friend, in consideration of care and medical attention and fifty dollars, is void, in the absence of evidence showing that the transaction was free from fraud and undue influence. *Norfleet* v. *Beall*, 538.

20. *Eminent domain. Value of land. Opinion of non-expert.*
In an eminent domain proceeding, it is competent for a witness, familiar with the land sought to be taken, to testify about crops which had been produced on it, its location, distance from transportation facilities, and the character of the soil, and therefrom to give his opinion of its value, although he is not an expert. *Board of Levee Commissioners* v. *Nelms*, 416.

21. *Same. Deeds. Recitals of value of neighboring land.*
Deeds to neighboring lands are not admissible in evidence in condemnation proceedings, although by their recitals they show the considerations paid for the lands conveyed by them. *Ib.*

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Evidence.

EVIDENCE—*Continued.*

22. *Eminent domain. Sales of neighboring lands.*

Sales of neighboring lands of like quality as that sought to be condemned, and prices actually paid, may be proved in condemnation proceedings, in order to weaken opinions of value. *Board of Levee Commissioners* v. *Nelms*, 416.

23. *Same. Opinions of land values. No sales.*

Opinion evidence of the value of the lands sought to be taken is admissible in condemnation proceedings, although no sales of neighboring lands have been made. *Ib.*

24. *Mortality tables. Life expectancy*

Mortality tables, not based on the general run of mankind, but made up from selected risks, persons sound in body and mind and of correct habits, do not prove the life expectancy of a person not shown to belong to the class from which the tables were made. *Vicksburg, etc., R. R. Co.* v. *White*, 468.

25. *Railroads. Fires. Escape of sparks. Other engines. Other times.*

In an action against a railroad company for the negligent burning of property claimed to have been ignited by sparks escaping from defendant's locomotives, evidence of the emission of sparks from other of defendant's locomotives, within a reasonable time before and after the starting of the fire in question, is admissible. *Alabama, etc., Ry. Co.* v. *Aetna Insurance Co.*, 770.

26. *Same.*

Alabama, etc., Ry. Co. v. Fried, 81 Miss., 314, a suit for damages resulting from the same fire as the one involved in these cases explained. *Ib.*

27. *Tax sales. Laws* 1890, *p.* 16, *ch.* 5. *List of state lands.*

An unsigned, unsealed, uncertified and unfiled writing, without proof of its origin or history, is insufficient to prove a sale of lands for taxes under Laws 1890, p. 16, ch. 5, providing that the auditor should prepare a correct list of state tax lands in each county and forward the same to the chancery clerk who should record the same and furnish a copy, certified under the seal of his office, to the sheriff and tax collector and empowering the tax collector with such copy to sell the lands, although the writing was properly captioned for the list to be furnished by the auditor under said statute and contained the lands in controversy. *Weiner* v. *Dickerson* 63.

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EVIDENCE—*Continued.*

28. *Wills. Attesting witnesses, Weight of evidence.*

Whether attesting witnesses have opportunities which are superior to those of other witnesses, to judge of and know the testator's mental capacity, at the time of the execution of his will, is a question of fact for the jury and not of law for the court. *King* v. *Rowan*, 1.

29. *Same. Devisavit vel non. Insanity. Burden of proof.*

Where on an issue *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *Ib.*

30. *Same. Instruction. Reasonableness or unreasonableness of will.*

Upon an issue *devisavit vel non* an instruction for contestants is erroneous if it authorize the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will. *Ib.*

31. *Same. Declarations of testator.*

The declarations of a testator touching his testamentary intentions are admissible in evidence on the issue of testamentary capacity and undue influence, whether made before, at the time, or after the execution of the will. *Sheehan* v. *Kearney*, 688.

32. *Same. Non-expert witnesses.*

Non-expert witnesses may give their opinions touching the soundness of testator's mind only as based on the facts testified to by them. *Ib.*

EXECUTIVE COMMITTEE OF POLITICAL PARTY.

See PRIMARY ELECTIONS.

State ex rel v. *Abbay*, 559.

EXECUTORS AND ADMINISTRATORS.

1. *Appraisers.*

An administrator has nothing to do with the appointment of appraisers. *O'Brien* v. *Wilson*, 93.

2. *Same. Liability.*

An administrator is not chargeable with property of which he had no knowledge and is bound only to exercise the care of a prudent man in the management of his own business. *Ib.*

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EXECUTORS AND ADMINISTRATORS—*Continued.*

3. *Detention of exempt property by widow.*

Where all the property left by a decedent, including money, did not equal the exemption to which his widow was entitled, neither the administrator nor any one else can take the money from her or hold her liable for it, no exemption having been set aside to her. *O'Brien* v. *Wilson*, 93.

EXEMPLARY DAMAGES.

See DAMAGES, 4, 5, 6.

Yazoo, etc., R. R. Co. v. *Smith*, 656.
Western, etc., Co. v. *Watson*, 101.
Yazoo, etc., R. R. Co. v. *White*, 120.

EXEMPT PROPERTY.

1. *Chancery. Order appointing receiver. Construction.*

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. *Levy* v. *Rossel*, 527.

2. *Detention of by widow.*

Where all the property left by a decedent, including money, did not equal the exemption to which his widow was entitled, neither the administrator nor any one else can take the money from her or hold her liable for it, no exemption having been set aside to her. *O'Brien* v. *Wilson*, 93.

FAMILY SUPPLIES.

See HUSBAND AND WIFE, 1.

Johnson v. *Jones*, 483.

FELLOW SERVANTS.

See RAILROADS, 14, 15.

Cheaves v. *Southern Ry. Co.*, 48.
Gulf, etc., R. R. Co. v. *Bussey*, 616.

FIRE INSURANCE.

1. *Ownership. Vendor and vendee.*

A vendor who admits his vendee into possession of real estate and receives from him a large payment on the purchase money, is not the sole and unconditional owner within the terms of a fire

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Fire insurance.

FIRE INSURANCE—*Continued.*

insurance policy stipulating that it shall be void if the insured is not such owner, though he retains the legal title under an agreement to convey it on the full payment of the purchase money. *Rosenstock* v. *Mississippi, etc., Co.*, 674.

2. *Ownership. Time of ownership. Issuance of policy.*
The condition of a policy of fire insurance that the same shall be void if the insured is not the sole and unconditional owner of the property, relates to ownership at the issuance of the policy. *Ib.*

3. *Same. Estate as beneficiary. Issuance without application.*
Where a fire insurance policy stipulates that the same shall be void if the insured is not the sole and unconditional owner of the property, and at the issuance of the policy the vendee of the decedent whose estate is the beneficiary had been admitted into possession and made a large payment on the purchase money, the policy is void, although no application had been made for the same and the decedent had taken out policies on the property for other years in his lifetime. *Ib.*

4. *Policy. Stipulation as to time within which to sue. Statute of limitations.*
Where a fire insurance policy provided that suit thereon must be brought, if at all, within a designated time, the provision is valid, and the time is not extended by the statute of limitations. *Ward* v. *Pennsylvania, etc., Co.*, 124.

5. *Same. Previous suits dismissed. Code* 1892, § 2756.
In such case where suit is brought after the expiration of the contract time it makes no difference that a previous suit, which was dismissed, had been brought within the time, nor is the case aided by Code 1892, § 2756, providing that if any action brought within the time limited by the statute of limitations be defeated for matter of form, or the judgment be arrested after verdict for plaintiff, he may bring a new action within a year from the abatement or other determination of the first suit. *Ib.*

6. *Same. Privilege tax. Code* 1892, § 3401. *Amnesty act. Laws* 1902, *ch.* 55.
In such case a plaintiff who could not recover in a suit begun before th eexpiration of the contract time, because he had not paid his privilege tax (Code 1892, § 3401), and who consequently dismissed his suit, cannot recover in a second suit, begun after the expiration of the time, although he had, before bringing the latter suit, availed himself of the amnesty act (Laws 1902, ch. 55), relieving him from the consequences of not having paid the tax. *Ib.*

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FIRE INSURANCE—*Continued.*

7. *Policy. Prohibition to sue. Injunction. Code* 1892, § 2758*a*.

In such case a plaintiff is not aided by Code 1892, § 2758a, providing that when any person shall be prohibited by law or enjoined from commencing any action, the time during which he shall be so prohibited or enjoined shall not be computed as part of the time limited by the statute of limitations within which suit may be brought. *Ward* v. *Pennsylvania, etc., Co.*, 124.

See GARNISHMENT.

Meridian, etc., Co. v. *Ormond*, 758.

FIRES.

See RAILROADS, 19, 20.

Alabama, etc., R'y Co. v. *Ætna Insurance Co.*, 770.

FIXTURES.

Tenant. Agreement with landlord.

Where the tenant of demised premises subject to a trust deed has replaced an old boiler with a new one in order to enable him to conduct the business for which the property was leased and by agreement with his landlord he was to have the right to remove the same at pleasure, the old boiler still remaining on the premises unused, his title to the new boiler is not affected by a sale of the premises under the trust deed and the conveyance of the same to a purchaser by a description which does not include the new boiler, although such boiler was connected with the boiler house by steam pipes and other necessary attachments. *Winner* v. *Williams*, 669.

FLAG STATIONS.

1. *Railroads. Failure to stop. Ignoring signals. Exemplary damages.*

Where the engineer of a passenger train saw and understood, but disregarded a signal to stop at a flag station when it was his duty to have stopped, and no reasonable explanation of his failure to stop is made, a question of fact is presented for the jury to determine whether his acts were characterized by malice, willfulness, wantonness, etc., justifying the award of exemplary damages. *Yazoo, etc., R. R. Co.* v. *White*, 120.

2. *Same. Instructions.*

In such case the plaintiff having asked and received an instruction to the effect that the jury might award exemplary damages if they believed the failure to stop was willful, reckless, or capri-

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FLAG STATIONS—*Continued.*

cious, it was error for the court to refuse an instruction asked for by defendant directing the jury not to award exemplary damages if the engineer did not act maliciously, deliberately, willfully, or wantonly. *Yazoo, etc., R. R. Co.* v. *White*, 120.

FOREIGN JUDGMENT.

See CIRCUIT COURTS, 1.

McDugle v. *Filmer*, 200.

FRAUDS, STATUTE OF.

See BUSINESS SIGN.

Meridian, etc., Co. v. *Ormond*, 758.

FREIGHT.

See CARRIERS, 1, 2, 3, 11, 12.

Johnson v. *Gulf, etc., R. R. Co.*, 452.

Alabama, etc., R'y Co. v. *Pounder*, 568.

See DEMURRAGE.

New Orleans, etc., R. R. Co. v. *George*, 710.

FIXTURES.

See GRAND JURY.

Blau v. *State*, 514.

GARNISHMENT.

1. *Business sign. Code* 1892, § 4234. *Undisclosed principal. Absence of sign. Insurance-policy.*

Code 1892, § 4234, provides that, if a person shall transact business, as a trader or otherwise, with the addition of the words "'agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read placed conspicuously at the place of business, or if any person shall transact business in his own name without any such addition, all the property used or acquired in such business shall be liable for the debts of the person so transacting the business; and under this statute:

(*a*) Where a mercantile business was conducted under the name "Ormond Grocery Company," without a sign disclosing the real owner, the property used and acquired therein is subject to the

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GARNISHMENT—*Continued.*

debts of the party transacting the business, although in so doing he was in truth the agent of an undisclosed principal; and

(*b*) The proceeds of a policy of fire insurance on goods acquired and used in such business and burned while in such use is liable to the creditors of the party who transacted such business, and may be garnished by them. *Meridian, etc., Co.* v. *Ormond*, 758.

2. *Process. Code* 1880, § 2422. *Judgment by default. Defective writ.*

A writ of garnishment, issued under Code 1880, § 2422, providing that a garnishee shall be summoned to answer in writing, which fails to notify the party garnisheed to make answer in writing, will not support a judgment by default against the garnishee. *Work* v. *Waggoner*, 591.

GRAND JURY.

Criminal procedure. Influenced by court. Indictment quashed. Code 1892, §§ 120, 1121. *Dealing in futures.*

It is sufficient ground for the quashal of a subsequently returned indictment (under Code 1892, §§ 1120, 1121, making it a crime to deal in futures) that the grand jury sought to be finally discharged without indicting defendant and the court refused to discharge them, and thereupon instructed them specifically touching the criminal character of defendant's business, saying that the law was plain and the court of opinion that they had sufficient evidence to find an indictment, that other grand juries had indicted, and that the business in which defendant was engaged was a flagrant violation of the statute. *Blau* v. *State*, 514.

GUARANTY.

Not continuing.

A guaranty of all amounts that may be due from the original debtor, within a designated sum, is not a continuing one. *Merchants, etc., Bank* v. *Calmes*, 603.

HOMESTEADS.

1. *Abandonment. Temporary absence. Animus revertendi.*

A temporary removal from the homestead by husband and wife because of necessity, they retaining an intention to return to the premises, is not such an abandonment of the home as will render valid the deed of the husband thereto, in which the wife did not join, under Code 1892, § 1983, providing that a conveyance by the husband of the homestead shall not be valid unless signed by the wife, etc. *Collins* v. *Bounds*, 447.

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Homesteads.

HOMESTEADS—*Continued.*

2. *Husband and wife. Conveyance. Code* 1892, § 1983. *Insanity.*

A wife cannot maintain a suit to vacate a deed conveying his homestead, in which she did not join, made by her husband after he had abandoned her and the homestead, because of the insanity of the husband at the time of the execution of the deed. *Larson* v. *Larson*, 116.

3. *Same. Ejectment. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her, when he executed the deed to the plaintiff. *Ib.*

4. *Public lands. Heirs of deceased homesteader. Revised statutes of United States*, §§ 2291, 2292.

There is no conflict between sections 2291 and 2292, United States Revised Statutes. The first, section 2291, provides that in case of the death of the person making an entry of public lands the certificate or patent shall issue to his heirs or devisees, and the second, section 2292, providing that in case of the death of both father and mother, leaving an infant child or children, the right shall inure to the benefit of such child or children, was intended to give the land to infants exclusively only when there are no adult heirs, *Holloman* v. *Bullock*, 405.

5. *Same. Act of congress, March* 3, 1891, *ch.* 561, § 8, 26 *Statutes at large*, 1099. *Annulment of patent. Limitation.*

The act of congress, approved March 3, 1891, sec 8, 26 Statutes at Large, 1099, providing that suits by the United States to vacate patents to lands shall be brought within a certain time, has no application to a suit brought by the heirs of one who made an entry of public lands for partition. *Ib.*

6. *Same. Revised Statutes of United States*, §§ 2290, 2291 *and* 2296. *Contracts to sell timber. Public policy.*

An agreement by a homesteader who has entered public land of the United States with a third person, that in consideration of the latter's advancing him money to make the entry and obtain the patent, he would sell such person the timber on the land, is not against public policy, and the subsequent sale of the timber after the issuance of the patent in pursuance of the agreement is valid. Revised Statutes of the United States, §§ 2290, 2291, and 2296 considered. *Butterfield, etc., Co.*, v. *Hartman*, 494.

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Homicide—Husband and wife.

HOMICIDE.

See CRIMINAL LAW AND PROCEDURE, 2, 3, 4, 7, 8, 9, 10, 11, 18, 19, 20, 22, 23, 24, 25, 38, 39; 40, 41, 42.

Owens v. *State*, 18.
Owens v. *State*, 31.
Gamblin v. *State*, 73.
Fugate v. *State*, 189.
Mackmasters v. *State*, 459.
Rogers v. *State*, 479.
Pulpus v. *State*, 548.
Fulcher v. *State*, 630.

HUSBAND AND WIFE.

1. *Family supplies. Code* 1892, § 2293. *Agency of husband. Scope extended. Wife's conduct.*

A wife (being under our constitution fully emancipated from all disability on account of coverture, Constitution 1890, § 94), may by her conduct extend the scope of her husband's statutory agency as limited by Code 1892, § 3293, providing that where, without a written recorded contract between husband and wife changing the relation, the husband carries on business with the means of the wife, such business shall be held to be on her account by the husband as her agent, and making her liable to persons dealing with him without notice for debts contracted in the course of such business. *Johnson* v. *Jones*, 483.

2. *Homestead. Conveyance. Code* 1892, § 1983. *Insanity.*

A wife cannot maintain a suit to vacate a deed conveying his homestead, in which she did not join, made by her husband after he had abandoned her and the homestead, because of the insanity of the husband at the time of the execution of the deed. *Larson* v. *Larson*, 116.

3. *Same. Ejectment. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her when he executed the deed to the plaintiff. *Ib.*

4. *Intoxicating liquors. Code* 1892, § 1590. *Penalty for selling. Place of business.*

A wife is not liable to the penalty prescribed by Code 1892, § 1590, providing that any person who shall sell or give away intoxicants unlawfully, or allow the same to be sold or given away

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HUSBAND AND WIFE—*Continued.*

at his place of business, for any purpose whatever, shall be subject to pay the state, county, and municipality each the sum of $500, because her husband, without her knowledge, contrary to her express orders and his promise to refrain from so doing, sells intoxicating liquors in her grocery store, although he be the general manager of her business. *Thurman* v. *Adams*, 204.

5. *Transfers of property. Code* 1892, § 2294. *Third persons.*

A husband who manages his wife's farm, under a verbal understanding with her that he is to own the crops, is not the owner of cotton produced thereon and cannot maintain a suit for its negligent destruction by a third person, under Code 1892, § 2294, providing that a transfer of property between husband and wife shall not be valid as against third parties, unless it be in writing and filed for record, and that possession of the property shall not be equivalent to filing the writing for record. *Williams* v. *Yazoo, etc. R. R. Co.*, 659.

INDICTMENT.

See CRIMINAL LAW AND PROCEDURE, 1, 8, 12, 16, 35.

False pretences. *State* v. *Mortimer*, 443.
Procuring intoxicants for inebriate. *Jenkins* v. *State*, 500.
Unduly influencing grand jury to indict. *Blau* v. *State*, 514.
Bigamy. *Lane* v. *State*, 555.
Robbery. *Smith* v. *State*, 793.

INEBRIATE.

Procuring intoxicants for. *Jenkins* v. *State*, 500.

See CRIMINAL LAW AND PROCEDURE, 15, 16, 17.

INFANCY.

Emancipation. Code 1892, §§ 493–497: *Code* 1892, § 1508. *Trust estate.*

The emancipation of a minor, under Code 1892, §§ 493, 497, authorizing the chancery court to remove the disability of infancy in certain cases, does not empower him to demand a conveyance of a trustee who holds land by a deed directing a conveyance to him when he becomes of age, since under Code 1892, § 1508 (declaratory of the common law), a minor is any person under twenty-one years of age. *Ray* v. *Kelly*, 597.

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INNOCENT PURCHASER.

See VENDOR AND VENDEE, 3.
Louisville, etc. R. R. Co. v. *Gulf, etc. Improvement Co.*, 180.

See LANDLORD AND TENANT, 1.
Ball v. *Sledge*, 749.

INSANITY.

1. *Devisavit vel non. Burden of proof.*

Where on an issue *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *King* v. *Rowan*, 1.

2. *Same.*

The burden of proof is on the proponents of the will both as to testamentary capacity and undue influence, but they make out their case *prima facie* by showing the due probation of the will. *Sheehan* v. *Kearney*, 688.

3. *Ejectment. Defense.*

A wife in possession of the husband's homestead, when sued in ejectment by his vendees, may show that he was insane at the time after abandoning her when he executed the deed to the plaintiff. *Larson* v. *Larson*, 116.

INSTRUCTIONS.

1. *Assault and battery. Civil action. Two assailants. Separate liability.*

In the absence of evidence of a conspiracy between plaintiff's assailants, their acts not being joint, a plaintiff cannot recover in a civil suit for an assault and battery against one of them because of injuries inflicted by the other, and a plaintiff's instruction authorizing such a recovery is not cured by one, given at defendant's request, informing the jury that defendant is not liable for the acts of the other assailant. *Stone* v. *Heggie*, 410.

2. *Same. Weapons. Not deadly per se. Manner of use.*

The manner in which a weapon, not deadly *per se* was used determines its character, and a charge to the jury, in a civil action for assault and battery, disregarding the manner of its use, its character being material, is erroneous. *Ib.*

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INSTRUCTIONS—*Continued.*

3. *Criminal law. Deadly weapons. Carrying concealed. Code* 1892, §§ 1026, 1027. *Threats.*

Where the evidence on the trial of an accused for carrying a deadly weapon concealed, under Code 1892, §§ 1026, 1027, regulating the subject, showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed. *Murdin* v. *State*, 507.

4. *Same. Intent to wound. Intent to kill. Intent to murder.*

An intent to wound is not an intent to murder, nor is an intent to kill necessarily an intent to murder, and an instruction for the state in a prosecution for an assault with intent to kill and murder is fatally erroneous, if it assume an intent to wound, or an intent to kill to be the same as an intent to murder. *Thames* v. *State*, 667.

5. *Same. Murder. Accessory before the fact. Code* 1892, § 950. *Sudden altercation.*

Where the state proceeds in a murder case on the theory that the defendant was an accessory before the fact (under the statute, Code of 1892, § 950, a principal) and had armed and instigated an hireling to aid two other persons in committing the murder, it was error to refuse defendant an instruction, there being testimony of which to predicate it, directing the jury to acquit, if they believed from the evidence that the hireling killed deceased, not in pursuance of defendant's instigation, but alone because of a sudden and unexpected altercation between deceased and one of the two persons mentioned. *Owens* v. *State*, 18.

6. *Same. Self-defense.*

In a murder case a defendant's instruction to the effect that the jury must acquit if there be a reasonable doubt whether at the time the deceased was struck by defendant he was attempting to strike defendant with a hoe, may be properly modified by adding thereto the words, "If you believe the hoe was a deadly weapon in the hands of deceased, and that it was really or apparently necessary for the defendant to strike to protect himself." *Fulcher* v. *State*, 630.

7. *Same.*

An instruction in a murder case is erroneous which denies defendant the right of self-defense, although he may have armed

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INSTRUCTIONS—*Continued.*

himself with a deadly weapon, intending to use it if necessary, and have been the aggressor in and provoker of the difficulty in which he killed deceased; the defendant had the right to abandon such intent and to show that the killing was not in pursuance of it. *Rogers* v. *State.* 479.

8. *Must be predicated of evidence.*

An instruction, in the absence of evidence of which to predicate it, is erroneous. *Ib.*

9. *Damages. Verdicts. Whims of jurors.*

Verdicts should be based on the facts of the case, not upon the whims or wishes, likes or dislikes, of the jurors; and an instruction authorizing the jury, if they find for plaintiff, to award such damages "as the jury shall see fit to assess" is erroneous. *Yazoo, etc. R. R. Co.* v. *Smith*, 656.

10. *Same. Instructions construed together.*

An instruction limiting the jury, if they find for plaintiff, in assessing damages to a consideration of the instructions given for the plaintiff, ignoring an instruction on the subject given for the defendant, is erroneous, since all the instructions on the subject should be considered and construed together. *Ib.*

11. *Same. Punitive damages.*

It is not error to refuse plaintiff an instruction authorizing the jury to award punitive damages when such damages would not be justified under any view of the facts of the case. *Ib.*

12. *Railroads. Flag stations. Failure to stop. Ignoring signals. Exemplary damages.*

Where the engineer of a passenger train saw and understood, but disregarded a signal to stop at a flag station when it was his duty to have stopped, and no reasonable explanation of his failure to stop is made, a question of fact is presented for the jury to determine whether his acts were characterized by malice, willfulness, wantonness, etc., justifying the award of exemplary damages, and in such case the plaintiff having asked and received an instruction to the effect that the jury might award exemplary damages if they believed the failure to stop was willful, reckless or capricious, it was error for the court to refuse an instruction asked for by defendant directing the jury not to award exemplary damages if the engineer did not act maliciously, deliberately, willfully, or wantonly. *Yazoo, etc. R. R. Co.* v. *White*, 120.

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INSTRUCTIONS—*Continued.*

13. *Time for asking. Code* 1892, § 732.

If a jury, after retiring to consider of their verdict, request additional instructions, either party may thereupon present to the court proper additional written instructions and ask that they be given and it will be error to refuse them on the ground that they were asked too late. *Clarke* v. *Pierce*, 462.

14. *Trespass. Damages. Sum demanded. Instruction not to exceed.*

It is not erroneous in an action of trespass for damages for the court to instruct the jury at plaintiff's request that they cannot award greater damages than the sum demanded in the declaration. *Gulf, etc. R. R. Co.* v. *Nelson*, 653.

15. *Will. Reasonableness or unreasonableness of.*

Upon an issue *devisavit vel non* an instruction for contestants is erroneous if it authorize the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will. *King* v. *Rowan*, 1.

INSULTS.

Use of stick.

While insulting words will not excuse or justify an assault and battery with a deadly weapon, yet a party insulted may use a stick, if he do not use it in the manner of a deadly weapon. *Stone* v. *Heggie*, 410.

INSURANCE.

See FIRE INSURANCE.

Rosenstock v. *Mississippi, etc. Co.*, 674.
Ward v. *Pennsylvania, etc. Co.*, 124.

See GARNISHMENT.

Meridian, etc. Co. v. *Ormond*, 758.

INTENT.

See CRIMINAL LAW AND PROCEDURE, 13, 14.

Thames v. *State*, 667.

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INTERCHANGE, JUDGES AND CHANCELLORS.

Constitutional law. Constitution 1890, *sec.* 158. *Chancellors. Code* 1892, § 458.

Code of 1892, § 458, authorizing chancellors to alternate and make temporary exchanges of their districts is constitutional, although by Constitution of 1890, sec. 158, the legislature is expressly authorized to provide by law for the interchange of circuit judges and there is no like constitutional provision respecting chancellors. *First National Bank* v. *Bloch*, 197.

INTERLOCUTORY DECREES.

See APPEAL, 1.

Levy v. *Rossel*, 68.

INTERSTATE STREAM.

See BRIDGES.

Kansas City, etc. R. R. Co. v. *Wiygul*, 223.

INTOXICANTS.

1. *Constitutional law. Statutes. Questioning validity. Estoppel. Laws* 1900, *chapter* 105. *Seizure.*

Where intoxicating liquors were seized, under laws 1900, ch. 105, providing therefor, and a party claim the same in pursuance of the provisions of said statute, he is not in position to insist that the statute is unconstitutional because it does not provide for notice. *Quin* v. *State*, 75.

2. *Husband and wife. Code* 1892, § 1590. *Penalty for selling. Place of business.*

A wife is not liable to the penalty prescribed by Code 1892, § 1590, providing that any person who shall sell or give away intoxicants unlawfully, or allow the same to be sold or given away at his place of business, for any purpose whatever, shall be subject to pay the state, county and municipality each the sum of $500, because her husband, without her knowledge, contrary to her express orders and his promise to refrain from so doing, sells intoxicating liquors in her grocery store, although he be the general manager of her business. *Thurman* v. *Adams*, 204.

3. *Procuring for inebriate. Knowledge. Code* 1899, § 1594.

Knowledge is not of the essence of the offense created by Code 1892, § 1594, making it unlawful to procure intoxicants for one in the habit of becoming intoxicated. *Jenkins* v. *State*, 500.

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INTOXICANTS—*Continued.*

4. *Procuring for inebriate. Indictment. Surplusage.*

If it be charged in an indictment for such offense that the accused knew that the person for whom the intoxicants were procured was in the habit of becoming intoxicated, and that the accused was not his parent or guardian and did not stand in loco parentis to such person, the averments are surplusage and need not be proved. *Jenkins* v. *State*, 500.

5. *Same. Actual delivery.*

It is unnecessary to prove in such case that the defendant actually delivered the intoxicants to the inebriate for whom they were procured, since one can procure an article for another without making the actual delivery. *Ib.*

JUDGES.

See INTERCHANGE OF JUDGES AND CHANCELLORS.

First National Bank v. *Bloch*, 197.

JUDGMENTS AND DECREES.

See ALIMONY.

Larson v. *Larson*, 116.

See JURISDICTION, 5.

McDugle v. *Filmer*, 200.

See GARNISHMENT.

Work v. *Waggoner*, 591.

JUDGMENT BY DEFAULT.

See GARNISHMENT.

Work v. *Waggoner*, 591.

JURISDICTION.

1. *Board of supervisors. Judicial action. Adjournment. Power to vacate.*

The board of supervisors, after final adjournment, is without power, ordinarily, to reverse or vacate its judicial acts. *Keenan* v. *Harkins*, 709.

2. *Same. Code* 1892, § 2059. *Stock law district. Adding territory.*

Where territory has been added to a stock law district by order of the board of supervisors the board cannot, at a subsequent meeting, vacate the order, except as authorized by statute, Code 1892, § 2059. *Ib.*

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Jurisdiction.

JURISDICTION—*Continued.*

3. *Circuit court. Justice's court. Appeal. Code* 1892, § 8384.

A circuit court has no jurisdiction of a suit begun before a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. Code 1892, §§ 83, 84. *Ball* v. *Sledge*, 747.

4. *Same. Supreme court.*

The supreme court has no jurisdiction of a case begun in the court of a justice of the peace, unless the circuit court had jurisdiction. *Ib.*

5. *Same. Foreign judgment. Costs. Amount.*

If the amount of the judgment of a justice of the peace in another state and the costs of suit therein paid by the plaintiff added exceed two hundred dollars the circuit court has jurisdiction of a suit for the aggregate amount brought in this state. *McDugle* v. *Filmer*, 200.

6. *Judgment. Tennessee justice of the peace. Collateral attack. Default. Hour of trial.*

The judgment of a Tennessee justice of the peace is not void (Shannon's Tennessee Code, § 5988) because tried on the return day of the summons and the record thereof does not show that the trial was after the hour named in the writ for defandant's appearance. *Ib.*

7. *Same. Writ of inquiry. Unliquidated damages.*

A judgment of a Tennessee justice of the peace cannot be assailed where sued upon in this state because it was rendered by default upon an unliquidated demand and the record does not show the award of a writ of inquiry to fix damages as required by the statutes of Tennessee (Shannon's Code, § 4679), since by the same statutes (§ 5988) it is provided that every intendment is in favor of the validity of proceedings before justices of the peace. *Ib.*

8. *Replevin. Jurisdiction. Value of property. Code* 1892, § 3707.

The affidavit, required by Code 1892, § 3707, as the basis of an action of replevin, determines the jurisdiction of the court so far as it concerns the value of the property sued for, unless the plaintiff knowingly undervalued or overvalued it for jurisdictional purposes. *Ball* v. *Sledge*, 749.

9. *Same. Code* 1892, § 629.

Code 1892, § 629, providing a penalty for sueing for more than is due for jurisdictional purposes, applies to justices' courts. Code 1892, § 629. *Ib.*

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JURY.

1. *Aliens. Constitution* 1890, *sec*, 264. *Objection after verdict.*

Under Constitution 1890, § 264, providing that jurors must be qualified electors, able to read and write, but the want of qualification of a juror shall not vitiate a verdict, an objection that a juror was an alien and therefore not a qualified elector cannot be made after verdict. *Fulcher* v. *State*, 630.

2. *Same. Absence of knowledge.*

In the absence of a showing that the facts of which an objection to a juror is predicated were unknown to the objecting party and his counsel when the juror was accepted on the panel, the objection will be unavailing. *Ib*

3. *Competency. Code* 1892, § 2355.

Under Code 1892, § 2355, providing that any person otherwise competent who will make oath that he is impartial shall be competent as a juror in any criminal case, although he has an impression or opinion as to the guilt of the accused, if it appear to the court that he has no bias and no desire to reach any result except that to which the evidence may conduct, the oath of the proffered juror is not conclusive, nor is he the judge of his own competency. *Fugate* v. *State*, 189.

4. *Same.*

A person is not qualified as a juror:

(*a*) Who has an opinion about the case and cannot say positively that he can try the case as though he had none; or

(*b*) Who has an opinion about the case and from what he knows could bring in a verdict (other than one predicated of a want of further knowledge) without further evidence; or

(*c*) Who has an opinion about the case which would require strong testimony to remove. *Ib.*

5. *Damages. Verdicts. Whims of jurors. Instruction.*

Verdicts should be based on the facts of the case, not upon the whims or wishes, likes or dislikes, of the jurors; and an instruction authorizing the jury, if they find for plaintiff, to award such damages "as the jury shall see fit to assess" is erroneous. *Yazoo, etc. R. R. Co.* v. *Smith*, 656.

6. *Grand jury. Influenced by court. Indictment quashed. Code* 1892, §§ 1120, 1121. *Dealing in futures.*

It is sufficient ground for the quashal of a subsequently returned indictment (under Code 1892, §§ 1120, 1121, making it a crime to deal in futures) that the grand jury sought to be finally dis-

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JURY—*Continued.*

charged without indicting defendant and the court refused to discharge them, and thereupon instructed them specifically touching the criminal character of defendant's business, saying that the law was plain and the court of opinion that they had sufficient evidence to find an indictment, that other grand juries had indicted, and that the business in which defendant was engaged was a flagrant violation of the statute. *Blau* v. *State*, 514.

JUSTICES OF THE PEACE.

1. *Appeal bond. Approval of justice. Time.*

The fact that a justice of the peace fails to indorse his approval on an apeal bond within five days after the rendition of judgment will not affect the validity of the appeal if his approval subsequently indorsed thereon show that the bond was filed within the five days. *Winner* v. *Williams*, 669.

2. *Same. Tender of bond.*

When an appeal bond has been tendered to a justice of the peace, the names of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing, which he cannot afterwards invalidate. *Ib.*

See JURISDICTION, 3, 5.

Ball v. *Sledge*, 747.

McDugle v. *Filmer*, 200.

LAND.

Contracts. Construction. Rescission.

A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the contract:

(*a*) When the other party has evinced his intention to abandon or repudiate the contract entirely; or

(*b*) When the other party has breached the contract in a matter which is vital to its existence, or is of its essence by the terms of the contract or the evident intention of the parties; or

(*c*) When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract, according to its terms, impossible. *Mortimer* v. *Hannah*, 645.

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LANDLORD AND TENANT.

1. *Agricultural products. Lien. Purchaser.*

A landlord has a lien to secure his rent and supplies for the current year on all the agricultural products raised on the leased premises, and he may assert the same against the products or the purchaser, with or without notice, of such products. *Ball* v. *Sledge*, 749.

2. *Same. Products out of State.*

The lien of the landlord does not follow agricultural products when carried out of this state, and the purchaser who acquires them out of this state is not liable to the landlord, although he had notice of the lien while they were in this state. *Ib.*

3. *Debtor and creditor. Payment in property subject to lien. Receipt. Enforcement of lien. Renewal of debt.*

A creditor who receives in this state in payment of his debt cotton upon which a third person has a landlord's lien may enforce repayment from the debtor, if the property or its proceeds be taken from him by the enforcement of the lien, although he had executed a receipt in full upon receiving the cotton. He cannot do so, however, if he received the cotton out of this state. *Ib.*

4. *Fixtures. Agreement.*

Where the tenant of demised premises subject to a trust deed has replaced an old boiler with a new one in order to enable him to conduct the business for which the property was leased, and by agreement with his landlord he was to have the right to remove the same at pleasure, the old boiler still remaining on the premises unused, his title to the new boiler is not affected by a sale of the premises under the trust deed and the conveyance of the same to a purchaser by a description which does not include the new boiler, although such boiler was connected with the boiler house by steam pipes and other necessary attachments. *Winner* v. *Williams*, 669.

5. *Unlawful entry and detainer. Stranger entering during term. Code* 1892, § 4461.

A landlord who has leased his land for a term and placed the tenant in possession cannot, during the term, maintain an action of unlawful entry and detainer, under Code 1892, § 4461, relating to that remedy, against a stranger who entered upon a part of the premises after the term began. *Hammel* v. *Atkinson*, 465.

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LARCENY.

1. *Criminal law. Rape. Evidence. Other offenses.*

On the trial of an indictment for rape it is error to admit evidence of the commission of larceny by the accused, such evidence not being necessary to identify the defendant and there being no connection between the offenses. *Dabney* v. *State*, 252.

2. *Same. Temporary use.*

The taking of property, without the owner's consent, merely for temporary use, without intent to deprive him permanently of his goods, does not constitute larceny of the goods. *Leland* v. *State*, 132.

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

Laws 1887, pp. 22-29, ch. 19. Levee commissioners. Condemnations. Procedure. *Board of Levee Commissioners* v. *Nelms*, 416.

Laws 1890, p. 16, ch. 5. Tax sales. List of state land. Evidence. *Weiner* v. *Dickerson*, 631.

Laws 1890, p. 386, ch. 250, sec. 8. Madison county supervisor's salary. *Adams* v. *Dendy*, 135.

Laws 1900, p. 79, ch. 69. Amendments of municipal charters. *Yazoo City* v. *Lightcap*, 148.

Laws 1900, p. 142, ch. 105. Seizure of intoxicants. Constitutional law. *Quin* v. *State*, 75.

Laws 1900, p. 164, ch. 124. Stock law district. Board of supervisors. Enlarging district. *Shaw* v. *Woffard*, 143.

Laws 1902, p. 52, ch. 55. Amnesty act. Privilege taxes. *Ward* v. *Pennsylvania, etc. Co.*, 124.

Laws 1902, p. 105, ch. 66. Primary elections. Recanvass of votes. Quo warranto. *State ex rel* v. *Abbay*, 559.

LEVEE COMMISSIONERS.

See EMINENT DOMAIN.

Board of Levee Commissioners v. *Nelms*, 416.

LIEN.

See DEMURRAGE, 2.

New Orleans, etc. R. R. Co. v. *George*, 710.

See LANDLORD AND TENANT, 1, 2.

Ball v. *Sledge*, 749.

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LIFE ESTATE.

Deeds. Conveyance by remainderman. Construction. Estoppel.

Where a son owned under a trust deed executed by his father the exact interest in lands which he would have inherited, on the death of his father intestate, had the deed not been executed, and after the death of the father conveyed, for a valuable consideration, all the interest he had in the lands "as heir of his father," he will not be permitted in equity to retain the consideration received and claim that his conveyance was wholly inoperative, but his deed will be construed as conveying his interest in the land. *Archer* v. *Yazoo, etc. R. R. Co.*, 110.

LIFE EXPECTANCY.

Evidence. Mortality tables.

Mortality tables, not based on the general run of mankind, but made up from selected risks, persons sound in body and mind, and of correct habits, do not prove the life expectancy of a person not shown to belong to the class from which the tables were made. *Vicksburg, etc. R. R. Co.* v. *White*, 468.

LIMITATION OF ACTIONS.

See STATUTES OF LIMITATION.

Ward v. *Pennsylvania, etc. Co.* 124.
Trowbridge v. *Schmidt*, 475.
Anderson v. *McNeal*, 542.

LIVE STOCK.

See STOCK LAW DISTRICT.

Shaw v. *Woffard*, 143.
Keenan v. *Harkins*, 709.

MANDAMUS.

1. *Distinct rights. Joint petition.*

Two or more distinct rights cannot be joined in a petition for mandamus to enforce them. *O'hlson* v. *Durfrey*, 213.

2. *Same. Witness. Right to certificates.*

The rights of two or more witnesses in the same case to have certificates of their attendance issued to them are distinct and not joint. *Ib.*

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MANDAMUS—*Continued.*

3. *Municipality. Allowance of barred claim. Warrant.*

The allowance by municipal authorities of a demand which is clearly barred by limitation is without consideration and *ultra vires*, and mandamus will not lie to enforce the issuance of a warrant or to complete an imperfect one, on such an allowance. *Trowbridge* v. *Schmidt*, 475.

4. *Primary election. Laws* 1902, *ch.* 66, *p.* 105. *Executive committee. Recanvas of returns. Defeated candidate.*

A defeated candidate for a nomination, under the primary election law (Laws 1902, ch. 66, p. 105), having knowledge of the facts which he claims rendered the successful candidate ineligible, who fails to present them to the executive committee of the party at the time it meets to canvass the returns and declare the result, cannot because of such facts afterwards, by mandamus, compel the committee to reassemble and review its conclusion, although section 14 of said law requires the committee to investigate and correct wrongs in a primary election. *State ex rel* v. *Abbay*, 559.

MARK OF PERSON FOR A SIGNATURE.

1. *Wills. Signing. Code* 1892, § 1520. *Code* 1892, § 4488.

Code 1892, § 4488, providing that a will shall be signed by the testator or by some person in his presence at his direction, is not qualified by Code 1892, § 1520, defining the word "written" and providing that it may include printing, engraving and lithographing, except where the signature of a person is required by law it shall be the proper hand-writing of such person, if he be able to write, and if not, his proper mark. *Sheehan* v. *Kearney*, 688.

2. *Same. Aiding testator to sign. Mark of person who can write.*

Another may aid a testator to sign his will, by steadying his hand, and a testator who can write may sign his will by his mark. *Ib.*

MARRIAGE.

1. *Common law. Married woman.*

A married woman cannot contract a common law marriage. *Blanks* v. *Southern R'y Co.*, 703.

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MARRIAGE—*Continued.*

2. *Same. Agreement. Cohabitation.*

Cohabitation, however long continued, between a married woman and an unmarried man will not ripen into a valid common law marriage, although from the beginning they agreed to be husband and wife, and constantly thereafter claimed and held themselves out to the world to be married each to the other. *Blanks* v. *Southern R'y Co.*, 703.

3. *Criminal law. Bigamy. Indictment. Defense. Marriage, prior to first one charged.*

If the first marriage charged in an indictment for bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. *Lane* v. *State*, 555.

MARRIED WOMAN.

A married woman cannot contract a common law marriage. *Blanks* v. *Southern R'y Co.*, 703.

MASTER IN CHANCERY.

Accounting. Reference. Misconduct of master. Electric methods.

Where a master, appointed to state an account involving business transactions covering a period of more than six years, makes his report less than one day, and apparently within two hours after the reference, his proceeding is too hasty to be productive of wholesome results, and his report should not be accepted by the court in the absence of evidence that due care and deliberation were given the subject. *Diggs* v. *Ingersoll*, 493.

MISJOINDER.

See REVIEW, BILL OF, 1.

Armistead v. *Barber*, 788.

MINORITY.

See INFANCY.

Ray v. *Kelley*, 597.

MONEY LOANED.

See TAXATION, 4, 5.

Adams v. *Colonial, etc. Co.*, 263.

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MORTAGAGES.

To secure barred debts.

A bona fide conveyance by a debtor to secure some of his creditors cannot be avoided by his other creditors without offering to pay the secured debts. *Anderson* v. *McNeal*, 542.

MORTUARY TABLES.

See LIFE EXPECTANCY.

Vicksburg, etc. Co. v. *White*, 468.

MUNICIPALITIES.

1. *Constitutional law. Municipal charters. Constitution* 1890, *sec.* 88.

Constitution 1890, sec. 88, providing that the legislature shall pass general laws under which cities and towns may be chartered and their charters amended, merely requires the passage of uniform general laws prescribing the mode by which such charters may be granted and amended, and does not require that such laws shall contain the entire contents of charters and amendments. *Yazoo City* v. *Lightcap*, 148.

2. *Same. Code* 1892, § 3039. *Laws* 1900, *p.* 79, *ch.* 69.

Code 1892, § 3039, as amended, Laws 1900, p. 79, ch. 69 authorizing the amendment of the charters of municipalities which have not adopted the code chapter on "municipalities," and allowing amendments inconsistent with said code chapter, is not violative of Constitution 1890, sec. 88, requiring the passage of general laws under which cities and towns may be chartered and their charters amended. *Ib.*

3. *Same. Delegation of legislative power.*

Laws 1900, p. 79, ch. 69, amending Code 1892, § 3039, so as to authorize amendments to charters of municipalities not operating under the code chapter on "municipalities" is not unconstitutional as delegating the exercise of legislative power. *Ib.*

4. *Bonds. Election. Joint purposes. Code* 1892, §§ 3014, 3016, 3017.

A municipality may order an election under Code 1892, § 3014, *et seq.*, submitting to the voters as a single proposition the issuance of bonds for two or more purposes. *Ib.*

5. *Defects in streets. Notice.*

A municipality may have such constructive or implied notice of defects in its streets as to render it liable for damages resulting therefrom. *Jackson* v. *Carver*, 583.

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MUNICIPALITIES—*Continued.*

6. *Defects in streets. Defects created by the municipality itself. Ordinary care.*

Where defects in a street were created by the municipality itself in the prosecution of a public work, and ordinary care would have discovered them, it is chargeable with notice of them. *Jackson* v. *Carver*, 583.

7. *Demands. Statutes of limitations. Code* 1892, § 2755.

When a claim against a municipality becomes barred by the statute of limitations, it ceases to be a debt, under Code 1892, § 2755, providing that the completion of the period of limitation shall defeat and extinguish the right as well as the remedy, although by said statute it is further provided that the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon. *Trowbridge* v. *Schmidt*, 475.

8. *Same. Duty of municipal authorities.*

It is the duty of municipal authorities to avail of the statutes of limitations as a defense to demands on the municipal treasury. *Ib.*

9. *Same. Allowance of barred claim. Warrant. Mandamus.*

The allowance by municipal authorities of a demand which is clearly barred by limitation is without consideration and *ultra vires*, and mandamus will not lie to enforce the issuance of a warrant or to complete an imperfect one, on such an allowance. *Ib.*

MURDER.

See CRIMINAL LAW AND PROCEDURE, 2, 3, 4, 7, 8, 9, 10, 11, 18, 19, 20, 22, 23, 24, 25, 38, 39, 40, 41, 42.

Owens v. *State*, 18.
Owens v. *State*, 31.
Gamblin v. *State*, 73.
Fugate v. *State*, 189.
Mackmasters v. *State*, 459.
Rogers v. *State*, 479.
Pulpus v. *State*, 548.
Fulcher v. *State*, 630.

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NAVIGABLE WATERS.

1. *Interstate stream. Bridges. Grant by state.*

A state may authorize the building of a bridge, wholly within its territory, over a navigable interstate stream, in the absence of congressional action touching the subject. *Kansas City, etc. R. R. Co.* v. *Wiygul*, 223.

2. *Same. Railroads. Power to bridge. Repairs.*

Power granted to a railroad company to build a bridge across a navigable stream includes the power to repair the same. *Ib.*

3. *Same. Acts of congress. U. S. comp. statutes*, 1901, *p.* 3540.

The acts of congress, approved March 3, 1899, sec. 10 (30 Statutes at Large, 1151), prohibiting the creation of any obstruction, not authorized by congress, to the navigable capacity of any waters of the United States, is prospective and was not intended to take away from a railroad company the power to repair a bridge, built by it over an interstate stream under a grant from the state. *Ib.*

4. *Same. Possession of part extended to whole tract.*

The fact that a body of land is divided by a navigable stream and the part actually occupied lies entirely on one side of the same will not of itself prevent the application of the doctrine that the actual occupation of a part of a tract by one, claiming under a deed, will be referred to all the lands conveyed by the deed. *Butts* v. *Ricks*, 533.

NEGLIGENCE.

1. *Common carrier. Delay in shipment. Pleading.*

A declaration against a common carrier charging an unreasonable and negligent delay in the shipment of freight, describing the freight and the points from and to which and the persons by and to whom the shipment was made, is not demurrable for a failure to state the facts of which the charge of negligence is predicated. *Alabama, etc. R'y Co.* v. *Pounder*, 568.

2. *Same. Delay in shipment. Notice of arrival.*

If a carrier, being under duty by universal and well understood custom to notify the consignee of the arrival of freight at the point to which it has been shipped, negligently delay giving such notice, it will be liable as for a delay in the shipment. *Ib.*

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NEGLIGENCE—*Continued.*

3. *Common carrier. Consignee's representatives. Demand. Wrong car.*

A carrier, under duty by custom to give notice of the arrival of freight, having knowledge that the consignee has a local agent and business representative at the point to which the goods had been shipped and received and who had repeatedly called therefor, is negligent if it fail to notify such representative of the arrival of the goods, although the agent called for the freight by the wrong car number, if the freight to the knowledge of the carrier had been transferred en route to a car of another number. *Alabama, etc., R'y Co.* v. *Pounder*, 568.

4. *Railroad. Fellow servant. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

Constitution 1890, sec. 193, touching the application of the fellow-servant rule in the case of railroad employes, has no application to an action based on the negligence of the railroad company itself, in failing to provide a safe road bed. *Gulf, etc., R. R. Co.* v. *Bussey*, 616.

5. *Same. Contributory negligence.*

Facts considered, and the defense of contributory negligence adjudged not to have been made out. *Ib.*

NOMINATIONS.

See PRIMARY ELECTIONS.

State ex rel. v. *Abbay*, 559.

NON-JOINDER.

See REVIEW, BILL OF, 1.

Armistead v. *Barber*, 788.

NON-RESIDENT MONEY LENDERS.

See TAXATION, 4, 5.

Adams v. *Colonial, etc., Co.*, 263.

NOTICE.

See CARRIERS, COMMON, 2, 3.

Alabama, etc., R'y Co. v. *Pounder*, 568.

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OFFICE.

Public school trustee.

Quo warranto will lie to test the right of one claiming to be a trustee of a public school, the trusteeship being an office. *Ellis* v. *Greaves*, 36.

ONUS PROBANDI.

See BURDEN OF PROOF.

King v. *Rowan*, 1.

Sheehan v. *Kearney*, 688.

OPINION EVIDENCE.

See EMINENT DOMAIN, 3.

EVIDENCE, 23.

Board of Levee Commissioners v. *Nelms*, 416.

OPTION.

Vendor and vendee. Contract for conveyance. Option.

A contract to convey a strip of land across certain sections along a railroad, one hundred feet wide on either side of the track, as surveyed, located and staked, at any time within two years from date, when requested by the railroad company and upon the payment of a stipulated sum, is but an option. *Louisville, etc. R. R. Co.* v. *Gulf, etc., Improvement Co.*, 180.

ORAL TESTIMONY IN CHANCERY COURT.

See CHANCERY PRACTICE, 1, 2, 3.

EVIDENCE, 1, 2, 3.

Dickerson v. *Askew*, 436.

Winner v. *Brandon*, 767.

PARTIES.

See REVIEW, BILL OF, 1.

Armistead v. *Barber*, 788.

PARTNERSHIP.

1. *Carrier. Assignment by one partner.*

Where property belonging to a partnership is mistakenly delivered by a carrier to a stranger, and the carrier pays the partnership therefor, receiving an assignment from only one of the

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PARTNERSHIP—*Continued.*

partners of his interest therein, it may sue the stranger for the value of the goods, notwithstanding the failure of the other partners to join in the assignment. *Johnson* v. *Gulf, etc., R. R. Co.*, 452.

2. *Dissolution. Contract. Construction.*

A contract between a retiring partner and his co-partners by which they agree to pay him the balance of a designated sum of money not required to satisfy certain firm debts which they might be "compelled to pay," and in which they agree "to make any defense that can be made" to said debts, does not forbid payment by the co-partners of said firm debts without suit, but leaves them free to pay what they were legally bound to pay and charge the retiring partner accordingly. *Rosenbaum* v. *Rosenbaum*, 454.

PAYMENT.

Debtor and creditor. Payment in property subject to lien. Receipt. Enforcement of lien. Renewal of debt.

A creditor who receives in this state in payment of his debt cotton upon which a third person has a landlord's lien may enforce repayment from the debtor, if the property or its proceeds be taken from him by the enforcement of the lien, although he had executed a receipt in full upon receiving the cotton. He cannot do so, however, if he received the cotton out of this state. *Ball* v. *Sledge*, 749.

PERSONAL JUDGMENT AND DECREES.

See ALIMONY.
Larson v. *Larson*, 116.

PHYSICIANS.

1. *Depositions. Evidence. Code* 1892, § 1747.

The fact that a witness is a physician living in another county, having a large practice and whose professional engagements are so much more than ordinarily numerous as to render it likely that he will be unable to attend court, does not authorize the taking of his deposition, under Code 1892, § 1747 providing that the deposition may be taken of a witness who is about to depart from the state or who, by reason of age, sickness or "other cause," shall be unable or likely to be unable, to attend court. *American Express Co.* v. *Bradford*, 130.

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PHYSICIANS—*Continued.*

2. *Undue influence. Confidential friend. Invalid grantor.*

A deed from an invalid, credulous and weak-minded old woman, prepared by the attorney of the grantee, purporting to convey her entire estate, a parcel of land, with the reservation of a life estate in the grantor, to her family physician and confidential friend, in consideration of care and medical attention and fifty dollars, is void, in the absence of evidence showing that the transaction was free from fraud and undue influence. *Norfleet* v. *Beall*, 538.

PLACE OF BUSINESS.

See INTOXICANTS, 2.

Thurman v. *Adams*, 204.

PLANTATION ROADS.

Railroads. Crossings. Code 1892, § 3561.

A railroad company which leaves a train of cars standing upon a plantation road-crossing for six consecutive days, so as to deprive the owner of its use continuously during that time is liable under Code 1892, § 3561, providing that every railroad shall make and maintain convenient and suitable crossings over its track for necessary plantation roads and giving a penalty for failure to do so. *Illinois, etc., R. R. Co.* v. *Denham*, 77.

PLEADINGS.

1. *Carrier, common. Delay in shipment. Negligence.*

A declaration against a common carrier charging an unreasonable and negligent delay in the shipment of freight, describing the freight and the points from and to which and the persons by and to whom the shipment was made, is not demurrable for a failure to state the facts of which the charge of negligence is predicated. *Alabama, etc., R'y Co.* v. *Pounder*, 568.

2. *Circuit court. Judgment for want of replication. Waiver.*

A motion by defendant for judgment for want of replication to a plea is waived if not called to the attention of the court until after the introduction of all the evidence and the presentation of a motion by plaintiff to exclude the defendant's evidence. *Slaydon* v. *McDonald*, 504.

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PLEADINGS—*Continued.*

3. *Construction.*

Pleadings are construed most strongly against the pleader. *Barrier* v. *Kelly*, 233.

4. *Special plea. General issue. Demurrer.*

A special plea is not demurrable because it amounts to the general issue. *Merchants, etc. Bank* v. *Calmes*, 603.

5. *Statute of limitations. Must be pleaded. Debtor.*

Unless the statute of limitations be pleaded by the debtor it is unavailing as a defense. *Anderson* v. *McNeal*, 542.

6. *Same. Other creditors.*

The unsecured creditors of a debtor cannot compel him to plead the statute of limitations as a defense to his secured debt. *Ib.*

POISONING.

Criminal law. Food, drink, etc. Code 1892, § 1255. *Corpus delicti. Confession. Evidence.*

Under Code 1892, § 1255, making it a crime to mingle poison with any food, drink or medicine with intent to kill or injure any human being, the *corpus delicti* is the mingling of the poison with the food, drink or medicine, and the same cannot be proved alone by the confession of the accused. *Stanley* v. *State*, 498.

PRESUMPTIONS.

See CONFESSIONS, 2.

Mackmasters v. *State*, 459.

PRIMARY ELECTIONS.

1. *Laws* 1902, *ch.* 66, *p.* 105. *Executive committee. Mandamus. Recanvas of returns. Defeated candidate.*

A defeated candidate for a nomination, under the primary election law (Laws 1902, ch. 66, p. 105), having knowledge of the facts which he claims rendered the successful candidate ineligible, who fails to present them to the executive committee of the party at the time it meets to canvass the returns and declare the result, cannot because of such facts afterwards, by mandamus, compel the committee to reassemble and review its conclusion, although section 14 of said law requires the committee to investigate and correct wrongs in a primary election. *State ex rel.* v. *Abbay*, 559.

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PRIMARY ELECTIONS—*Continued.*

2. *Laws* 1902, *ch.* 66, *p.* 105. *Nominations declared. Legality of votes adjudicated.*

Where the party executive committee, under said law, declares a candidate the party nominee it necessarily adjudicates as legal the votes cast for him. *State ex rel.* v. *Abbay*, 559.

PRIVATE ROADS.

See RAILROADS, 2.

Yazoo, etc. R. R. Co. v. *Watson*, 89.

PRIVILEGED COMMUNICATIONS.

Slander. Statements to officers.

Statements casually made to officers, not for the public good, which were also made to other persons, are not privileged communications. *Bigner* v. *Hodges*, 215.

PRIVILEGE TAXES.

See FIRE INSURANCE, 6.

Ward v. *Pennsylvania, etc. Co.*, 124.

PROCESS.

1. *Alimony. Personal judgment. Code* 1902, § 3421. *Publication only.*

Under Code 1892, § 3421, providing for publication of summons for non-resident defendants, a personal judgment for alimony cannot be rendered in favor of a wife against her non- resident husband upon proof of publication only. *Larson* v. *Larson*, 116.

2. *Criminal procedure. Absent witness. Attachment. Not found.*

The return of "not found" on an attachment for an absent witness does not necessarily warrant the denial of a continuance on account of his absence. *Fooshee* v. *State*, 509.

3. *Garnishment. Code* 1880, § 2422. *Judgment by default. Defective writ.*

A writ of garnishment, issued under Code 1880, § 2422, providing that a garnishee shall be summoned to answer in writing, which fails to notify the party garnisheed to make answer in writing, will not support a judgment by default against the garnishee. *Work* v. *Waggoner*, 591.

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PROFITS.

Contract. Breach. When recovered. Established business.

The anticipated profits of an established business, which would not be speculative, but the direct and immediate fruits attending the performance of a contract, may be recovered for its breach. *White* v. *Leatherberry*, 103.

PROHIBITION TO SUE.

See STATUTES OF LIMITATION, 4.

Ward v. *Pennsylvania, etc. Co.*, 124.

PROMOTERS.

Corporations. Contracts. When corporation not liable.

A corporation is not liable on contracts made by its promoters unless it adopts the same or receives their benefits. *Bank of Forest* v. *Orgill*, 81.

PROTEST.

Accord and satisfaction. Tender in full settlement. Acceptance.

If a creditor accept from his debtor a sum of money tendered in full satisfaction of his debt, and which would not otherwise have been paid to him, there is an accord and satisfaction, and he cannot recover more, although at the time he accepted he protested that more was due, and threatened to sue for the balance. *Cooper* v. *Yazoo, etc., R. R. Co.*, 634.

PUBLICATION.

See PROCESS, 1.

Larson v. *Larson*, 116.

PUBLIC LANDS.

1. *Homestead. Heirs of deceased homesteader. Revised statutes of United States, §§ 2291, 2292.*

There is no conflict between sections 2291 and 2292, United States Revised Statutes. The first, section 2291, provides that in case of the death of the person making an entry of public lands the certificate or patent shall issue to his heirs or devisees, and the second, section 2292, providing that in case of the death of both father and mother, leaving an infant child or children, the right

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PUBLIC LANDS—*Continued.*

shall inure to the benefit of such child or children, was intended to give the land to infants exclusively only when there are no adult heirs. *Holloman* v. *Bullock*, 405.

2. *Homestead. Act of congress, March* 3, 1891, *ch.* 561, § 8, 26 *statutes at large*, 1099. *Annulment of patent. Limitation.*

The act of congress, approved March 3, 1891, section 8, 26 Statutes at Large, 1099, providing that suits by the United States to vacate patents to lands shall be brought within a certain time, has no application to a suit brought by the heirs of one who made an entry of public lands for partition.

3. *Same. Revised statutes of United States*, §§ 2290, 2291 *and* 2296. *Contracts to sell timber. Public policy.*

An agreement by a homesteader who has entered public land of the United States with a third person, that in consideration of the latter's advancing him money to complete the entry and obtain the patent, he would sell such person the timber on the land, is not against public policy, and the subsequent sale of the timber after the issuance of the patent in pursuance of the agreement is valid. Revised Statutes of the United States, secs. 2290, 2291, and 2296 considered. *Butterfield, etc., Co.* v. *Hartman*, 494.

PUBLIC POLICY.

Usury. Contract to waive.

A contract by a borrower to waive, directly or indirectly, the usury laws is against public policy and void. *Georgia, etc., Association* v. *Grant*, 424.

PUBLIC SCHOOLS.

1. *Quo Warranto. Office. School trustee. Code* 1892, § 3520.

A trustee of a public school is an officer within the meaning of Code 1892, § 3520, providing a remedy by *quo warranto* against persons unlawfully holding office. *Ellis* v. *Greaves*, 36.

2. *Constitutional law. Constitution* 1869, *art.* 8, *sec.* 1; *constitution* 1890, *sec.* 201. *Uniform system of public schools. Departures from general school law.*

Constitution 1869, art. 8, sec. 1 (Constitution 1890, sec. 201), making it the duty of the legislature to establish a uniform system of public schools, prohibited the appointment by legislative act of designated persons as trustees of a public school for a term of

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PUBLIC SCHOOLS—*Continued.*

twenty years, and granting them power to fill vacancies in their number, exclusive control of the school and other powers not conferred on trustees of public schools generally. *Ellis* v. *Greaves*, 36.

3. *Constitutional law. Laws* 1888, *p.* 173, *ch.* 198. *Code* 1892, § 4008.

While Code 1892, § 4008, regulating the election of public school trustees generally, but providing that existing trustees of certain separate school districts should remain in office according to the terms of their appointment, did not supercede laws 1888, chapter 148, appointing and conferring extraordinary powers upon the trustees of the Hazelhurst public school, yet said act of 1888 was and is violative of Constitution of 1869, art. 8, sec. 1 (Constitution 1890, sec. 201), requiring a uniform system of public schools. *Ib.*

PUNITIVE DAMAGES.

See DAMAGES, 4, 5, 6.

Yazoo, etc., R. R. Co. v. *Smith*, 656.
Yazoo, etc., R. R. Co. v. *White*, 120.
Western, etc., Co. v. *Watson*, 101.

QUO WARRANTO.

Office. School trustee. Code 1892, § 3520.

A trusteeship of a public school is an office within the meaning of Code 1892, § 3520, providing a remedy by *quo warranto* against persons unlawfully holding office. *Ellis* v. *Greaves*, 36.

RAILROADS.

1. *Crossings. Plantation roads. Code* 1892, § 3561.

A railroad company which leaves a train of cars standing upon a plantation road-crossing for six consecutive days, so as to deprive the owner of its use continuously during that time is liable under Code 1897, § 3561, providing that every railroad shall make and maintain convenient and suitable crossings over its track for necessary plantation roads and giving a penalty for failure to do so. *Illinois, etc., R. R. Co.* v. *Denham*, 77.

2. *Same. Defective condition. Injury to traveler. Private road.*

If a railroad company, with knowledge of the use by the public of a road crossing its track, constructs approaches in such a manner as to render them dangerous to travelers using them with

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Railroads.

RAILROADS—*Continued.*

due care, it is liable to a person so using them who is injured because of their negligent construction, whether the road be a public or private one. *Yazoo, etc., R. R. Co.* v. *Watson*, 89.

3. *Delay in shipment. Pleading. Negligence.*

A declaration against a common carrier charging an unreasonable and negligent delay in the shipment of freight, describing the freight and the points from and to which and the persons by and to whom the shipment was made, is not demurrable for a failure to state the facts of which the charge of negligence is predicated. *Alabama, etc., R'y Co.* v. *Pounder*, 568.

4. *Same. Notice of arrival.*

If a carrier, being under duty by universal and well understood custom to notify the consignee of the arrival of freight at the point to which it has been shipped, negligently delay giving such notice, it will be liable as for a delay in the shipment. *Ib.*

5. *Same. Consignee's representatives. Demand. Wrong car.*

A carrier, under duty by custom to give notice of the arrival of freight, having knowledge that the consignee has a local agent and business representative at the point to which the goods had been shipped and received and who had repeatedly called therefor, is negligent if it fail to notify such representative of the arrival of the goods, although the agent called for the freight by the wrong car number, if the freight to the knowledge of the carrier had been transferred en route to a car of another number. *Ib.*

6. *Same. Variance, Appellate practice.*

In an action against a carrier by a consignee for the difference between what the plaintiff would have sold the goods for upon prompt delivery and what he was compelled to sell them for after delayed delivery, a variance between the declaration and and the proof as to the name of the purchaser of the goods cannot be availed of for the first time in the supreme court. *Ib.*

7. *Demurrage. Carriers of freight. Rules.*

A railroad can make and enforce rules imposing reasonable demurrage charges on consignees for delay in unloading cars. *New Orleans, etc., R. R. Co.* v. *George*, 710.

8. *Same. Lien for demurrage. Code* 1892, § 2108.

Code 1892, § 2108, giving a carrier a lien for freight and storage, with power to sell therefor, applies to demurrage for delay in unloading cars. *Ib.*

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RAILROADS—*Continued.*

9. *Demurrage. Notice.*

Formal notice is unnecessary to make a consignee liable for demurrage charges, if he knows of the arrival of the cars for him. *New Orleans, etc., R. R. Co.* v. *George*, 710.

10. *Same. Private sidings. Delivery, when full. Partnership sidings.*

Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding be full, the road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding. *Ib.*

11. *Same. Demurrage on certain freight. Not on all.*

A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds. *Ib.*

12. *Same. Several cars. Demurrage enforced on one for all.*

Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against its contents separately, but enough may be retained to satisfy the charge against all. *Ib.*

13. *Dog, seen on track. Duty of engineer. Carelessness. Wilfulness.*

If the engineer of a railroad train saw, or should have seen, a bloodhound trailing along the track a short distance in advance of the train, and having time to do so, does not give warning or do anything to prevent his engine from striking the animal and thereby causes it to be run over and killed by the train, his carelessness amounts to design and the railroad company will be liable to the owner for the value of the dog. *Kansas City, etc. R. R. Co.* v. *Hawkins*, 209.

14. *Fellow servants. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

Under Constitution 1890, sec, 193, and Code 1892, § 3559 providing that every employe of a railroad corporation shall have the same remedies for an injury suffered from the act or omission of the corporation or its employes as allowed to other persons not employes, where the injury results from the negligence of a superior agent or officer or one having the right to control the service of the party injured, a declaration in a suit by a fireman

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Railroads.

RAILROADS—*Continued.*

charging that he was injured by the negligence of the engineer who was superior, having the right to control plaintiff's service (using the language of the constitution and statute in making the charge) is not demurrable. *Cheaves* v. *Southern R'y Co.*, 48.

15. *Fellow servants. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

Constitution 1890, § 193, touching the application of the fellow-servant rule in the case of railroad employes, has no application to an action based on the negligence of the railroad company itself, in failing to provide a safe road bed. *Gulf, etc., R. R. Co.* v. *Bussey*, 616.

16. *Same. Contributory negligence.*

Facts considered, and the defense of contributory negligence adjudged not to have been made out. *Ib.*

17. *Flag stations. Failure to stop. Ignoring signals. Exemplary damages.*

Where the engineer of a passenger train saw and understood, but disregarded a signal to stop at a flag station when it was his duty to have stopped, and no reasonable explanation of his failure to stop is made, a question of fact is presented for the jury to determine whether his acts were characterized by malice, willfulness, wantonness, etc., justifying the award of exemplary damages *Yazoo, etc., R. R. Co.* v. *White*, 120.

18. *Same. Instructions.*

In such case the plaintiff having asked and received an instruction to the effect that the jury might award exemplary damages if they believed the failure to stop was willful, reckless or capricious, it was error for the court to refuse an instruction asked for by defendant directing the jury not to award exemplary damages if the engineer did not act maliciously, deliberately, willfully or wantonly. *Ib.*

19. *Fire. Storage of cotton near track. Contributory negligence.*

The storage of cotton bales in rows, tier above tier, with a passage way between the rows, ninety feet from a railroad track, tarpaulins being spread over the bales, but leaving part of the cotton near the ground unprotected, does not constitute such contributory negligence as will defeat the owner from recovering from the railroad company for the negligent burning of the cotton. *Alabama, etc., R'y Co.* v. *Ætna, etc., Co.*, 770.

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Railroads.

RAILROADS—*Continued.*

20. *Fire. Evidence. Escape of sparks. Other engines. Other times.*

In an action against a railroad company for the negligent burning of property, claimed to have been ignited by sparks escaping from defendant's locomotives, evidence of the emission of sparks from other of defendant's locomotives, within a reasonable time before and after the starting of the fire in question, is admissible. *Alabama, etc., R'y Co.* v. *Ætna, etc., Co.*, 770.

21. *Freight. Mistaken delivery. Suit.*

Where a carrier by mistake delivered freight to a person not entitled to receive the same, it may sue such person in trover for the property, or waive the tort and sue for the value of the goods, without an assignment to it from the owner. *Johnson* v. *Gulf, etc. R. R. Co.*, 452.

22. *Same. Partnership. Assignment by one partner.*

Where property belonging to a partnership is mistakenly delivered by a carrier to a stranger, and the carrier pays the partnership therefor, receiving an assignment from only one of the partners of his interest therein, it may sue the stranger for the value of the goods, notwithstanding the failure of the other partners to join in the assignment. *Ib.*

23. *Navigable waters. Interstate streams. Bridges. Grant by state.*

A state may authorize the building of a bridge, wholly within its territory, over a navigable interstate stream, in the absence of congressional action touching the subject. *Kansas City, etc., R. R. Co.* v. *Wiygul*, 223.

24. *Same. Railroads. Power to bridge. Repairs.*

Power granted to a railroad company to build a bridge across a navigable stream includes the power to repair the same. *Ib.*

25. *Same. Act of congress. U. S. comp. statutes*, 1901, *p.* 3540.

The act of congress, approved March 3, 1899, sec. 10 (30 Statutes at Large, 1151), prohibiting the creation of any obstruction, not authorized by congress, to the navigable capacity of any waters of the United States, is prospective and was not intended to take away from a railroad company the power to repair a bridge, built by it over an interstate stream under a grant from the state. *Ib.*

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Rape.

RAPE.

1. *Evidence. Larceny. Other offenses.*

On the trial of an indictment for rape it is error to admit evidence of the commission of larceny by the accused, such evidence not being necessary to identify the defendant and there being no connection between the offenses. *Dabney* v. *State*, 252.

2. *Same. Benefit of doubt.*

The general rule is that evidence of other crimes than the one for which the accused is being tried is inadmissible, and if it be doubtful whether such evidence falls within any of the exceptions to the rule it should be excluded. *Ib.*

3. *Same.*

Discussion of exceptions to the general rule. *Ib.*

4. *Evidence. Reputation for chastity.*

In a prosecution for rape it is error to permit the state to show:

(*a*) That prosecutrix was a chaste woman, her general reputation in that regard not having been assailed by defendant;

(*b*) That defendant ill treated members of his household, where such evidence does not tend to explain delay in the prosecution;

(*c*) That a witness not called by the defense had been told by defendant that she would have to swear lies to help him out; and

(*d*) That witnesses had heard noises indicating distress at defendant's house, they not knowing what made the noises or why they were made. *Baker* v. *State*, 84.

5. *Same. Delay in prosecution.*

Long delay in prosecuting for rape demands a close scrutiny of the testimony before conviction. *Ib.*

6. *Passive resistance. Silent objection.*

It is not rape to have sexual intercourse with a woman over the age of consent whose resistance is passive and objection silent, unless she be overcome by drugs, or other means. *Anderson* v. *State*, 784.

7. *Same. Evidence. Prosecutrix's declarations.*

Upon the trial of an indictment for rape, the state may show that the prosecutrix made complaint of her injury shortly after the assault upon her, but may not show the particulars stated by her, nor that she charged defendant with the wrong. *Ib.*

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RAPE—*Continued.*

8. *Rape. Alibi.*

It is prejudicial error on a trial for rape to permit the declarations of the prosecutrix touching the particulars of, and charging defendant with, the wrong to be given in evidence, although the defense be an alibi. *Anderson* v. *State*, 784.

RECEIVERS.

1. *Interlocutory decree. Appeal. Code* 1892, § 34.

A defendant from whom property is taken and placed in the hands of a receiver by an interlocutory decree, notwithstanding his claim that it is exempt from liability to his creditors (Code 1892, § 1971) is entitled to an appeal from the decree, under Code 1892, § 34, providing for appeals from interlocutory orders whereby the possession of property is changed. *Levy* v. *Rossel*. 68.

2. *Order appointing. Construction. Exemption.*

A decree appointing a receiver impliedly limits the right of the receiver to property which is not exempt from execution. *Levy* v. *Rossel*, 527.

RECITALS.

See DEEDS, 1, 5.

Weiner v. *Dickerson*, 63.
Board of Levee Commissioners v. *Nelms*, 416.
Morrison v. *Casey*, 522.

REPLEVIN.

1. *Replevin. Jurisdiction. Value of property. Code* 1892, § 3707.

The affidavit, required by Code 1892, § 3707 as the basis of an action of replevin, determines the jurisdiction of the court so far as it concerns the value of the property sued for, unless the plaintiff knowingly undervalued or overvalued it for jurisdictional purposes. *Ball* v. *Sledge*, 749.

2. *Same. Code* 1892, § 629.

Code 1892, § 649, providing a penalty for sueing for more than is due for jurisdictional purposes, applies to justices courts. Code 1892, § 629. *Ib.*

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RESCISSION.

Lands. Contracts. Construction.

A party to an equitable mutual contract in reference to land, fairly entered into, has the right to rescind the contract:

(*a*) When the other party has evinced his intention to abandon or repudiate the contract entirely; or

(*b*) When the other party has breached the contract in a matter which is vital to its existence, or is of its essence by the terms of the contract or the evident intention of the parties; or

(*c*) When the other party has been guilty of a partial breach of performance, which has inflicted damage upon the complainant for which no adequate redress can be had, or which inflicts irreparable injury, or which renders a final completion of the contract, according to its terms, impossible. *Montimer* v *Hannah*, 645.

REVIEW, BILL OF.

1. *Chancery. Interest of litigants. Misjoinder. Non-joinder. Parties.*

A bill in equity seeking to review the proceedings and decrees in a partition suit should —

(*a*) Set forth the interest of all the parties;

(*b*) Join all the parties to the original suit or show the facts justifying their nonjoinder; and

(*c*) Show the facts justifying the joinder of persons not parties to the original suit, if any be joined. *Armistead* v. *Barber*, 788.

2. *Same. Infants. Amendments.*

Where some of the parties seeking relief by a bill of review are infants and were defendants to the original suit, and it be charged that they were not served with process therein, it will be error upon sustaining a demurrer to the bill to dismiss the same without granting leave to amend, although such leave was not asked. *Ib.*

RIGHT OF WAY.

See EJECTMENT.

Lott v. *Payne*, 218.

ROADS.

See RAILROADS.

Yazoo, etc. R. R. Co. v. *Watson*, 89.

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ROBBERY.

See CRIMINAL LAW AND PROCEDURE, 35.

Smith v. *State*, 793.

RULES.

See DEMURRAGE, 1.

New Orleans, etc., R. R. Co. v. *George*, 710.

SALES UNDER DEEDS OF TRUST.

See TRUSTEES' FEES.

Elkin v. *Rives*, 744.

SCHOOL TEACHERS.

Criminal law. False pretenses. Indictment.

An indictment against a public school teacher charging that, with intent to defraud the county, he made a false report to the county school superintendent for the second month of his school, upon the faith of which he was allowed a second assistant teacher for the third month, and that with intent to defraud, etc., he obtained a teacher's pay certificate for such assistant, is demurrable in the absence of a charge that the attendance on the school for the third month did not entitle defendant to the second assistant during said third month, and that the certificate was not compensation for services actually rendered by said assistant during the third month. *State* v. *Montimer*, 443.

SCHOOL TRUSTEES.

Trustees of public schools are officers within the law of quo warranto proceedings. *Ellis* v. *Greaves*, 36.

SEDUCTION.

1. *Criminal law. Chastity of woman. Code* 1892, § 1298.

Under Code 1892, § 1298, making it a crime to seduce a woman over sixteen years of age by virtue of any feigned or pretended marriage or false promise of marriage, the previous chaste character of the woman is an essential element of the crime. *Fooshee* v. *State*, 509.

SEIZURE OF INTOXICANTS.

See CONSTITUTIONAL LAW, 9.

Quin v. *State*, 75.

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SELF-DEFENSE.

1. *Criminal law. Murder. Instruction.*

An instruction in a murder case is erroneous which denies defendant the right of self-defense, although he may have armed himself with a deadly weapon, intending to use it if necessary, and have been the aggressor in and provoker of the difficulty in which he killed deceased; the defendant had the right to abandon such intent and to show that the killing was not in pursuance of it. *Rogers* v. *State*, 479.

2. *Same. Self-defense.*

In a murder case a defendant's instruction to the effect that the jury must acquit if there be a reasonable doubt whether at the time the deceased was struck by defendant he was attempting to strike defendant with a hoe, may be properly modified by adding thereto the words, "If you believe the hoe was a deadly weapon in the hands of deceased, and that it was really or apparently necessary for the defendant to strike to protect himself.' *Fulcher* v. *State*, 630.

3. *Same. Surrender of right.*

The right of self-defense is not surrendered, although defendant armed himself with a deadly weapon and sought his adversary with intent to kill him and was the aggressor in the altercation in which he killed him, if after the beginning of the altercation defendant abandoned the intent and the killing was not in pursuance of it. *Pulpus* v. *State*, 548.

SERVANTS.

See FELLOW SERVANTS.

Cheaves v. *Southern R'y Co.*, 48.
Gulf, etc., R. R. Co. v. *Bussey*, 616.

SHIPMENTS.

See CARRIERS, COMMON, 1, 2, 3, 11.

Alabama, etc., R'y Co. v. *Pounder*, 568.

SIGN.

See BUSINESS SIGN.

Meridian, etc., Co. v. *Ormond*, 758.

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SIGNING.

See WILLS, 4, 5.

Sheehan v. *Kearney*, 688.

SLANDER.

1. *Allegata and probata. Variance.*

An allegation in a declaration for slander that defendant had falsely spoken and published of and concerning plaintiff, a butcher, that he, the plaintiff, "had butchered and sold to his patrons a steer affected with a loathsome disease and which at the time had a running sore or cancer on its leg," is supported by testimony showing that defendant had so spoken and published of and concerning plaintiff, the following words: "He had butchered and sold a steer which was unfit for use, because it had a running sore on its leg," and the variance was immaterial. *Bigner* v. *Hodges*, 215.

2. *Privilege communication. Statements to officers.*

Statements causually made to officers, not for the public good, which were also made to other persons, are not privileged communications. *Ib.*

STATUTE.

1. *Constitutional law. Questioning validity. Estoppel. Laws* 1900, *ch.* 105. *Seizure of intoxicating liquors.*

Where intoxicating liquors were seized, under laws 1900, ch. 105, providing therefor, and a party claim the same in pursuance of the provisions of said statute, he is not in position to insist that the statute is unconstitutional because it does not provide for notice. *Quin* v. *State*, 75.

2. *Telegram. Received in one state. Delivery in another. Contract. Conflict of laws. Common law.*

The rule that the validity of a contract made in one state, for the transmission and delivery of a dispatch in another, is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Postal, etc., Co.* v. *Wells*, 733.

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STATUTE OF FRAUDS.

Business Sign. Code 1892, § 4234. *Undisclosed principal. Absence of sign. Insurance policy.. Garnishment.*

Code 1892, § 4234, provides that, if a person shall transact business, as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read placed conspicuously at the place of business, or if any person shall transact business in his own name without any such addition, all the property used or acquired in such business shall be liable for the debts of the person so transacting the business; and under this statute.

(*a*) Where a mercantile business was conducted under the name "Ormond Grocery Company," without a sign disclosing the real owner, the property used and acquired therein is subject to the debts of the party transacting the business, although in so doing he was in truth the agent of an undisclosed principal; and,

(*b*) The proceeds of a policy of fire insurance on goods acquired and used in such business and burned while in such use is liable to the creditors of the party who transacted such business, and may be garnished by them. *Meridian, etc., Co.* v. *Ormond*, 758.

STATUTE OF LIMITATIONS.

1. *Fire Insurance. Policy. Stipulation as to time within which to sue.*

Where a fire insurance policy provided that suit thereon must be brought, if at all, within a designated time, the provision is valid, and the time is not extended by the statute of limitations. *Ward* v. *Pennsylvania, etc., Co.*, 124.

2. *Same. Previous suits dismissed. Code* 1892, § 2756.

In such case where suit is brought after the expiration of the contract time it makes no difference that a previous suit, which was dismissed, had been brought within the time, nor is the case aided by Code 1892, § 2756, providing that if any action brought within the time limited by the statute of limitations be defeated for matter of form, or the judgment be arrested after verdict for plaintiff, he may bring a new action within a year from the abatement or other determination of the first suit. *Ib.*

3. *Same. Privilege tax. Code* 1892, § 3401. *Amnesty act. Laws* 1902, *ch.* 55.

In such case a plaintiff who could not recover in a suit begun before the expiration of the contract time, because he had not paid his privilege tax (Code 1892, § 3401), and who consequently dis-

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missed his suit, cannot recover in a second suit, begun after the expiration of the time, although he had, before bringing the latter suit, availed himself of the amnesty act (laws 1902, ch. 55), relieving him from the consequences of not having paid the tax. *Ward* v. *Pennsylvania, etc., Co.*, 124.

4. *Fire Insurance. Prohibition to sue. Injunction. Code* 1892, § 2758*a*.

In such case a plaintiff is not aided by Code 1892, § 2758*a*, providing that when any person shall be prohibited by law or enjoined from commencing any action, the time during which he shall be so prohibited or enjoined shall not be computed as part of the time limited by the statute of limitations within which suit may be brought. *Ib.*

5. *Municipalities. Demands. Code* 1892, § 2755.

When a claim against a municipality becomes barred by the statute of limitations, it ceases to be a debt, under Code 1892, § 2755, providing that the completion of the period of limitation shall defeat and extinguish the right as well as the remedy, although by said statute it is further provided that the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon. *Trowbridge* v. *Schmidt*, 475.

6. *Same. Duty of municipal authorities.*

It is the duty of municipal authorities to avail of the statutes of limitations as a defense to demands on the municipal treasury. *Ib.*

7. *Same. Allowance of barred claim. Warrant. Mandamus.*

The allowance by municipal authorities of a demand which is clearly barred by limitation is without consideration and *ultra vires*, and mandamus will not lie to enforce the issuance of a warrant or to complete an imperfect one, on such an allowance. *Ib.*

8. *Plea. Must be pleaded. Debtor.*

Unless the statute of limitations be pleaded by the debtor it is unavailing as a defense. *Anderson* v. *McNeal*, 542.

9. *Same. Other creditors.*

The unsecured creditors of a debtor cannot compel him to plead the statute of limitations as a defense to his secured debt. *Ib.*

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STATUTE OF LIMITATIONS—*Continued.*

10. *Plea. Mortgage to secure barred debts.*

A bona fide conveyance by a debtor to secure some of his creditors cannot be avoided by his other creditors without offering to pay the secured debts. *Anderson* v. *McNeal*, 542.

11. *Taxation. Deed. Code* 1892, § 2635.

Where a purchaser of land at a tax sale went into the actual possession of the land after the expiration of the time allowed for redemption and remained in such possession for three years, claiming under his tax deed, a suit to recover the land because of defects in the tax sale or any step leading to the sale is barred. *Butts* v. *Ricks*, 533.

STOCK LAW DISTRICT.

1. *Board of supervisors. Judicial action. Adjournment. Power to vacate.*

The board of supervisors, after final adjournment, is without power, ordinarily, to reverse or vacate its judicial acts. *Keenan* v. *Harkins*, 709.

2. *Same. Code* 1892, § 2059. *Adding territory.*

Where territory has been added to a stock law district by order of the board of supervisors the board cannot at a subsequent meeting vacate the order, except as authorized by statute, Code 1892, § 2059. *Ib.*

3. *Laws* 1900, *p.* 164, *ch.* 124. *Board of supervisors. Enlarging districts.*

Under laws 1900, ch. 124 (Laws, p. 164), empowering them so to do, the board of supervisors may create a stock law district less in area than a township, if the territory thereof be adjoining and contiguous to a pre-existing district in the same or an adjoining county. *Shaw* v. *Woffard*, 143.

STREETS.

1. *Municipalities. Defects in. Notice.*

A municipality may have such constructive or implied notice of defects in its streets as to render it liable for damages resulting therefrom. *Jackson* v. *Carver*, 583.

2. *Same. Defects created by the municipality itself. Ordinary care.*

Where defects in a street were created by the municipality itself in the prosecution of a public work, and ordinary care would have discovered them, it is chargeable with notice of them. *Ib.*

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SUPERVISORS, BOARD OF.

See BOARD OF SUPERVISORS.

Judicial action. *Keenan* v. *Harkins*, 709.
Salary. *Adams* v. *Dendy*, 135.
Stock law district. *Shaw* v. *Woffard*, 143.
Taxation. *Butts* v. *Ricks*, 533.

SUPREME COURT PRACTICE.

1. *Jurisdiction.*

The supreme court has no jurisdiction of a case begun in the court of a justice of the peace, unless the circuit court had jurisdiction. *Ball* v. *Sledge*, 747.

2. *Objections. Criminal law. Supreme Court practice. Code* 1892, § 4370. *Must be seasonable.*

Exceptions in the trial court, not jurisdictional in their nature, must be seasonably made to prevent the application of Code 1892, § 4370, providing that a judgment in a criminal case shall not be reversed because of any error in the court below, unless the record show that the error complained of was made ground of special exception in that court. *Short* v. *State*, 473.

3. *Same. Want of arraignment. Arrest of judgment.*

Exception predicated of the fact that the defendant in a criminal case was not formally arraigned, not being jurisdictional, is not seasonably made if presented for the first time by a motion in arrest of judgment. *Ib.*

4. *Variance.*

In an action against a carrier by a consignee for the difference between what the plaintiff would have sold the goods for upon prompt delivery and what he was compelled to sell them for after delayed delivery, a variance between the declaration and the proof as to the name of the purchaser of the goods cannot be availed of for the first time in the supreme court. *Alabama etc., R'y Co.* v. *Pounder*, 568.

SURPLUSAGE.

See INTOXICANTS, 3.

Jenkins v. *State*, 500.

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TAXATION.

1. *Assessment. Ambiguity. Parol evidence.*

An assessment of land in these words, "Huntington & Le Valley Add. Owner's name Goyer Company, All section 9 and 10, Township ———, Range 18," cannot be shown by parol to mean lots 9 and 10 of Block 18 of Huntington & Le Valley's addition to the city of Greenville. *Leavenworth* v. *Greenville, etc., Co.*, 578.

2. *Same. Unconstitutional act of legislature. Abandonment.*

A valid and existing assessment of land is not affected by the passage of an unconstitutional and void act of the legislature purporting to provide for a new assessment, and cannot be said to have been abandoned. *Butts* v. *Ricks*, 533.

3. *Statute of limitations. Code* 1892, § 2635.

Where the purchaser of land at a tax sale went into the actual possession of the land after the expiration of the time allowed for redemption, and remained in such possession for three years, claiming under his tax deed, a suit to recover the land because of defects in the tax sale or any step leading to the sale is barred, under Code 1892, § 2735, so providing. *Ib.*

4. *Loans by nonresidents. Business situs. Mortgages.*

Loans of money by a nonresident of the state who has no business location or agent here, made on applications sent to the lender or his agent out of the state, are not taxable in this state, although negotiations for the loans are made here and they are secured by mortgages on lands here. *Adams* v. *Colonial, etc., Co.*, 263.

5. *Same. Code* 1892, § 3757.

Code 1892, § 3757, providing for the assessment and taxation of money loaned applies only to resident lenders of money and such nonresident lenders as have a place of business or be temporarily located in this state or whose property has a situs here.

TAX SALES AND TAX DEEDS.

1. *Assessment roll. Time for filing extended. Auditor of public accounts. Code* 1892, § 3784.

The auditor of public accounts has no power to extend the time for filing an assessment roll; this can be done only by the board of supervisors, under Code 1892, § 3784, empowering the board in the premises. *Bennett* v. *Maxwell*, 70.

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Tax sales and tax deeds.

TAX SALES AND TAX DEEDS—*Continued.*

2. *Description. False recital. County of location. Tax collector. Power.*

A deed to an eighty-acre tract of land, accurately described by governmental survey description, executed by the owner, will convey the whole tract, although it be recited in the conveyance to be situated in a designated county when only a part thereof is so situated; but a tax collector's deed under such circumstances does not convey lands without his county. *Morrison* v. *Casey.* 522.

3. *Evidence. Laws* 1890, *p.* 16, *ch.* 5. *List of state lands.*

An unsigned, unsealed, uncertified, and unfiled writing, without proof of its origin or history, is insufficient to prove a sale of lands for taxes under Laws 1890, p. 16, ch. 5, providing that the auditor should prepare a correct list of state tax lands in each county and forward the same to the chancery clerk who should record the same and furnish a copy, certified under the seal of his office, to the sheriff and tax collector and empowering the tax collector with such copy to sell the lands, although the writing was properly captioned for the list to be furnished by the auditor under said statute and contained the lands in controversy. *Weiner* v. *Dickerson*, 63.

4. *Same. Recitals in deed.*

The recitals of a sheriff's and tax collector's deed, made under said statute, are insufficient to prove the jurisdictional facts authorizing a sale thereunder. *Ib.*

5. *Statute of limitations. Code* 1892, § 2635.

Where the purchaser of land at a tax sale went into the actual possession of the land after the expiration of the time allowed for redemption and remained in such possession for three years, claiming under his tax deed, a suit to recover the land because of defects in the tax sale or any step leading to the sale is barred, under Code 1892, § 2735, so providing. *Butts* v. *Ricks*, 533.

6. *Same. Possession of part extended to whole tract. Navigable stream.*

The fact that a body of land is divided by a navigable stream and the part actually occupied lies entirely on one side of the same will not of itself prevent the application of the doctrine that the actual occupation of a part of a tract by one, claiming under a deed, will be referred to all the lands conveyed by the deed. *Ib.*

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TELEGRAPH COMPANY.

1 *Delay in delivering messages.*

A telegraph company which wrongfully delayed the delivery of a message from a wife to her husband announcing the illness of a child and requesting the husband's immediate return home, is liable to the wife for its negligence, where the delay resulted in the husband's failure to return as soon as he would have done had the message been promptly delivered. *Western, etc., Co.* v. *Pearce*, 487.

2 *Same. Special damages. Pregnancy. Want of notice.*

Although a telegraph company failed to seasonably deliver a message from a wife to her husband, she cannot therefor recover an item of special damage which resulted alone from the fact that she was pregnant, in the absence of evidence that the company had notice of her condition. *Ib.*

3. *Same. Wilful delay. Punitive damages. Message announcing death.*

Where a telegraph company received for transmission and delivery a message to a woman announcing the death of her husband, but failed to deliver the same for several days, its failure being without excuse and so negligent as to amount to willfulness, it is liable to the sendee for punitive, as well as actual, damages. *Western, etc., Co*, v. *Watson*, 101.

4] *Same. Actual damage.*

In such case the plaintiff cannot recover an item of actual damage not shown to have been suffered. *Ib.*

5. *Error in message. Tort. Sendee's right.*

If a telegraph company receive in another state a message for transmission and delivery to the sendee in this state, and negligently deliver him a different message, to his damage, it will be liable to him in tort therefor. *Postal, etc., Co.* v. *Wells*, 733.

6] *Same. Stipulations on back of message. Limiting liability. Constitution* 1890, § 195.

A stipulation on the back of a telegraph message to the effect that the company will not be liable, beyond the charge paid for the transmission, for mistakes in unrepeated messages or errors in transmitting cipher messages, is unavailing as a defense, under Constitution 1890, sec. 195, declaring telegraph companies common carriers in their line of business and subject to liability as such. *Ib.*

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TELEGRAPH COMPANY—*Continued.*

7. *Error in message. Message received in one state. Delivery in another. Contract. Statutes. Common law.*

The rule that the validity of a contract, made in one state for the transmission and delivery of a dispatch in another is to be determined by the statutes of the state where made, has no application when the common law governs the subject in the state where the contract was made. *Postal, etc., Co.* v. *Wells*, 733.

TENANTS.

See LANDLORD AND TENANT.

Fixtures. *Winner* v. *Williams*, 669.
Lien. *Ball* v. *Sledge*, 749.
Unlawful detainer. *Hammel* v. *Atkinson*, 465.

TENANTS IN COMMON.

Conveyance by one. Specific part. Rights of cotenants. Effect of deed. Estoppel.

A deed from one tenant in common to a specific part of a general tract of land owned by several:

(*a*) Is inoperative to impair any of the rights of the grantor's cotenants;

(*b*) But, if the part so conveyed be allotted upon partition to the grantor in the deed, the grantee will take the same by estoppel; he will not, however, be invested with an interest in any part of the general tract not conveyed by the deed. *Kenoye* v. *Brown*, 607.

TENDER.

1. *Accord and satisfaction. In full settlement. Acceptance. Protest.*

If a creditor accept from his debtor a sum of money tendered in full satisfaction of his debt, and which would not otherwise have been paid to him, there is an accord and satisfaction, and he cannot recover more, although at the time he accepted he protested that more was due, and threatened to sue for the balance. *Cooper* v. *Yazoo, etc., R. R. Co.*, 634.

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TENDER—*Continued.*

2. *Justice of the peace. Appeal.*

When an appeal bond has been tendered to a justice of the peace, the names of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing, which he cannot afterwards invalidate. *Winner* v. *Williams*, 669.

THREATS.

Criminal law. Deadly weapons. Carrying concealed. Code 1892, §§ 1620, 1027. *Instruction.*

Where the evidence on the trial of the accused for carrying a deadly weapon concealed, under Code 1892, §§ 1026, 1027, regulating the subject, showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed. *Murdin* v. *State*, 507.

TRESPASS.

Damages. Sum demanded. Instruction not to exceed.

It is not erroneous in an action of trespass for damages for the court to instruct the jury at plaintiff's request that they cannot award greater damages than the sum demanded in the declaration. *Gulf, etc., R. R. Co.* v. *Nelson*, 653.

TRUST ESTATES.

Infancy. Emancipation. Code 1892, §§ 493–497: *Code* 1892, § 1508.

The emancipation of a minor, under Code 1892, §§ 493-497, authorizing the chancery court to remove the disability of infancy in certain cases, does not empower him to demand a conveyance of a trustee who holds land by a deed directing a conveyance to him when he becomes of age, since under Code 1892, § 1508 (declaratory of the common law), a minor is any person under twenty-one years of age. *Ray* v. *Kelly*, 597.

TRUSTEE'S FEES.

Deed of trust. Sale under. Attorney's fees.

If a deed of trust be enforced by the trustee making sale of the property, he is entitled to retain from the proceeds for his services only a reasonable compensation to himself as trustee,

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TRUSTEE'S FEES—*Continued.*

although the note evidencing the debt secured by the deed stipulates for the payment of an attorney's fee in case it be collected by an attorney and the trustee is an attorney and a member of a firm of attorneys to whom the payee intrusted the note for collection. *Elkin* v. *Rives*, 744.

UNDUE INFLUENCE.

See WILLS, 6, 7.

King v. *Rowan*, 1.
Sheehan v. *Kearney*, 538.

See PHYSICIANS, 2.

Norfleet v. *Beall*, 538.

UNDISCLOSED PRINCIPAL.

See BUSINESS SIGN.

Meridian, etc. Co. v. *Ormond*, 758.

UNLAWFUL ENTRY AND DETAINER.

Landlord and tenant. Stranger entering during term. Code 1892, § 4461.

A landlord who has leased his land for a term and placed the tenant in possession cannot, during the term, maintain an action of unlawful entry and detainer, under Code 1892, § 4461, relating to the remedy against a stranger who entered upon a part of the premises after the term began. *Hammel* v. *Atkinson*, 465.

UNLIQUIDATED DAMAGES.

See DAMAGES, 9.

McDugle v. *Filmer*, 200.

USURY.

Contract to waive. Public policy.

A contract by a borrower to waive, directly or indirectly, the usury laws is against public policy and void. *Georgia, etc., Association* v. *Grant*, 424.

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VALUE.

See EMINENT DOMAIN, 1, 2, 3, 4.
Levee Commissioners v. *Nelms*, 416.

See REPLEVIN, 1.
Ball v. *Sledge*, 749.

VARIANCE.

See SLANDER, 1.
Bigner v. *Hodges*, 215.

See SUPREME COURT PRACTICE, 4.
Alabama, etc. R'y Co. v. *Pounder*, 568.

VENDOR AND VENDEE.

1. *Contract for conveyance. Option.*

A contract to convey a strip of land across certain sections along a railroad, one hundred feet wide on either side of the track, as surveyed, located and staked, at any time within two years from date, when requested by the railroad company and upon the payment of a stipulated sum, is but an option. *Louisville, etc. R. R. Co.* v. *Gulf, etc., Improvement Co.*, 180.

2. *Fire insurance. Ownership.*

A vendor who admits his vendee into possession of real estate and receives from him a large payment on the purchase money, is not the sole and unconditional owner within the terms of a fire insurance policy stipulating that it shall be void if the insured is not such owner, though he retains the legal title under an agreement to convey it on the full payment of the purchase money. *Rosenstock* v. *Mississippi, etc., Co.*, 674.

3. *Same. Adverse possession. Necessity of exclusive possession. Innocent purchaser.*

A railroad company claiming under an option contract, never recorded, having for more than ten years used and enclosed only a strip fifty feet wide on either side of its track, the same being sufficient for all of its purposes, and allowed the landowner to use and enclose the balance, cannot claim said balance by adverse possession; nor can it as against innocent purchasers for value claim that the legal title to said balance was held in trust for it. *Louisville, etc., R. R. Co.* v. *Gulf, etc., Improvement Co.*, 180.

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Vendor and vendee—Waiver.

VENDOR AND VENDEE—*Continued.*

4. *Fire insurance. Possession of part of tract. Extended by construction. Limitation on doctrine.*

Actual adverse possession of a part of the land described in a conveyance under which the possessor claims title will extend a constructive actual possession only to so much of the land as is used in connection with the tract actually possessed and which is reasonable and proper for that purpose, according to the custom of the country. *Ib.*

VENUE.

See CHANGE OF VENUE.

Owen v. *State*, 31.

VERDICT.

1. *Ambiguity.*

Where the terms of a verdict are ambiguous the court is authorized and under a duty to have the jury make their meaning plain. *Owens* v. *State*, 18.

2. *Same.*

In a murder case, the jury being authorized upon conviction to fix defendant's punishment at imprisonment for life in the penitentiary, a verdict in these words, "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty to serve a term in the state penitentiary, and ask the mercy of the court," is insufficient to support a judgment sentencing defendant to the penitentiary for life, each juror having stated upon the return of the verdict, in response to the court, that he did not mean that a death sentence should be imposed and most of them that the word "term" in the verdict meant less than life imprisonment. *Ib.*

3. *Damages. Whims of jurors. Instruction.*

Verdicts should be based on the facts of the case, not upon the whims or wishes, likes or dislikes, of the jurors; and an instruction authorizing the jury, if they find for plaintiff, to award such damages "as the jury shall see fit to assess" is erroneous. *Yazoo, etc., R. R. Co.* v. *Smith*, 656.

WAIVER.

1. *Pleadings. Circuit Court. Judgment for want of replication.*

A motion by defendant for judgment for want of replication to a plea is waived if not called to the attention of the court until

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WAIVER—*Continued.*

after the introduction of all the evidence and the presentation of a motion by plaintiff to exclude the defendant's evidence. *Slaydon* v. *McDonald*, 504.

2. *Usury.*

A contract by a borrower to waive, directly or indirectly, the usury laws is against public policy and void. *Georgia, etc., Association* v. *Grant*, 424.

WEAPONS.

1. *Deadly. Carrying concealed. Code* 1892, §§ 1620, 1027. *Threats. Instruction.*

Where the evidence on the trial of an accused for carrying a deadly weapon concealed, under Code 1892, §§ 1026, 1027, regulating the subject, showed that defendant had been threatened and the threats communicated to her, it is error to ignore the threats and instruct the jury to convict upon the belief that she carried the weapon concealed. *Murdin* v. *State*, 507.

2. *Not deadly per se. Manner of use.*

The manner in which a weapon, not deadly *per se*, was used determines its character, and a charge to the jury, in a civil action for assault and battery, disregarding the manner of its use, its character being material, is erroneous. *Stone* v. *Heggie*, 410.

3. *Same. Insults. Use of stick.*

While insulting words will not excuse or justify an assault and battery with a deadly weapon, yet a party insulted may use a stick, if he do not use it in the manner of a deadly weapon. *Ib.*

WIDOW.

Detention of exempt property by.

Where all the property left by a decedent, including money, did not equal the exemption to which his widow was entitled, neither the administrator nor any one else can take the money from her or hold her liable for it, no exemption having been set aside to her. *O'Brien* v. *Wilson*, 93.

WILLS.

1. *Attesting witnesses. Weight of evidence.*

Whether attesting witnesses have opportunities which are superior to those of other witnesses, to judge of and know the testator's mental capacity, at the time of the execution of his will, is a question of fact for the jury and not of law for the court. *King* v. *Rowan*, 1.

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Wills.

WILLS—*Continued.*

2. *Devisavit vel non. Insanity. Burden of proof.*

Where on an issue *devisavit vel non* the question is whether the testator was sane or insane at the time of the execution of the will, the contestants are not required to prove his insanity beyond all reasonable doubt. *King* v. *Rowan*, 1.

3. *Same. Instruction. Reasonableness or unreasonableness of will.*

Upon an issue *devisavit vel non* an instruction for contestants is erroneous if it authorize the jury, without qualification or limitation, to consider the reasonableness or unreasonableness of the will. *Ib.*

4. *Signing. Code* 1892, § 1520. *Code* 1892, § 4488.

Code 1892, § 4488, providing that a will shall be signed by the testator or by some person in his presence at his direction, is not qualified by Code 1892, § 1520, defining the word "written" and providing that it may include printing, engraving, and lithographing, except where the signature of a person is required by law it shall be the proper hand-writing of such person, if he be able to write, and if not, his proper mark. *Sheehan* v. *Kearney*, 688.

5. *Same. Aiding testator to sign. Mark of person who can write.*

Another may aid a testator to sign his will, by steadying his hand, and a testator who can write may sign his will by his mark. *Ib.*

6. *Evidence. Declarations of testator.*

The declarations of a testator touching his testamentary intentions are admissible in evidence on the issue of testamentary capacity and undue influence, whether made before, at the time or after the execution of the will. *Ib.*

7. *Contest. Burden of proof. Probation prima facie.*

The burden of proof is on the proponents of a will on an issue *devisavit vel non* both as to testamentary capacity and undue influence, but they make out their case *prima facie* by showing the due probation of the will. *Ib.*

8. *Evidence in rebuttal.*

After contestants have introduced their evidence on the issue *devisavit vel non* to meet the *prima facie* case made by showing the due probation of the will, the proponents may introduce evidence in rebuttal. *Ib.*

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Wills—*Continued*,

9. *Non-expert witnesses.*

Non-expert witnesses may give their opinions touching the soundness of testator's mind only as based on the facts testified to by them. *Sheehan* v. *Kearney*, 688.

WITNESSES.

1. *Absent. Attachment. Not found.*

The return of "not found" on an attachment for an absent witness does not necessarily warrant the denial of a continuance on account of his absence. *Fooshee* v. *State*, 509.

2. *Attesting. Weight of evidence.*

Whether attesting witnesses have opportunities which are superior to those of other witnesses, to judge of and know the testator's mental capacity, at the time of the execution of his will, is a question of fact for the jury and not of law for the court. *King* v. *Rowan*, 1.

3. *Depositions. Evidence. Physician. Code* 1892, § 1747.

The fact that a witness is a physician, living in another county, having a large practice and whose professional engagements are so much more than ordinarily numerous as to render it likely that he will be unable to attend court, does not authorize the taking of his deposition, under Code 1892, § 1747, providing that the deposition may be taken of a witness who is about to depart from the state, or who, by reason of age, sickness, or "other cause," shall be unable, or likely to be unable, to attend court. *American, etc., Co.* v. *Bradford*, 130.

4. *Inducement to testify.*

Where a state's witness, who had been convicted of the crime, stated upon cross-examination on the trial of his co-defendant that no inducement had been offered him to testify as he had done, the state should not be permitted to prove the truth of the statement by the prosecuting attorney. *Owens* v. *State*, 18.

5. *Non-experts.*

Non-expert witnesses may give their opinions touching the soundness of testator's mind only as based on the facts testified to by them. *Sheehan* v. *Kearney*, 688.

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WITNESSES—*Continued.*

6. *Right to certificates.*

The rights of two or more witnesses in the same case to have certificates of their attendance issued to them are distinct and not joint. *O'hlson* v. *Durfrey*, 212.

WRIT OF INQUIRY.

Unliquidated damages.

A judgment of a Tennessee justice of the peace cannot be assailed where sued upon in this state because it was rendered by default upon an unliquidated demand and the record does not show the award of a writ of inquiry to fix damages as required by the statutes of Tennessee (Shannon's Code, § 4679), since by the same statutes (§ 5988) it is provided that every indentment is in favor of the validity of proceedings before justices of the peace. *McDugle* v. *Filmer*, 200.

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